TO

J. A. M

IN REMEMBRANCE OF

HIS FONDNESS FOR POLITICAL HISTORY

AND HIS LOVE OF THE TRUTH

FOUR PHASES OF AMERICAN DEVELOPMENT

FEDERALISM—DEMOCRACY—IMPERIALISM—EXPANSION

BY

JOHN BASSETT MOORE, LL.D.,

PROFESSOR OF INTERNATIONAL LAW, COLUMBIA UNIVERSITY, NEW YORK, SOMETIME ASSISTANT SECRETARY OF STATE OF THE UNITED STATES, AUTHOR OF A DIGEST OF INTERNATIONAL LAW, OF A HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS, OF "AMERICAN DIPLOMACY, ITS SPIRIT AND ACHIEVEMENTS," ETC.

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FOREWORD

The four lectures embraced in the present volume were delivered at the Johns Hopkins University, in April last, on the foundation established there by James Schouler, lawyer and historian, for lectures in history and political science. Their object is to give, not a chronological detail of related or unrelated incidents, but rather a general survey of important movements, explained in the light of the causative facts, whether these be particular acts, or human traits and tendencies disclosed by men acting in the mass or individually. This is, in the writer's opinion, the historian's primary task. To frame indictments, to condemn and exculpate, to distribute censures and pronounce encomiums, on the strength of preconceptions as to what ought to have taken place, belongs to the historical moralist, the nobility of whose aims is supposed to justify him in exacting from the past, as the price of its exoneration, an anticipatory conformity to his own views. The function of the historian, if apparently less exalted, is more truthful. It is

also more difficult of performance, and requires a wider range of thought, of investigation and of sympathies. History is the drama of the ages reduced to writing. The historian, like the dramatist, may also be and in a qualified sense necessarily is a moralist, since every picture of life conveys a lesson of some kind. But his first duty is that of exposition. He deals in realities. His chief end is to recreate the past, so that the reader may live in it and, seeing things as they were, understand things as they are.

J. B. M.

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LECTURE I

Federalism

History, as popularly conceived and even as sometimes written, may be described as the philosophy of hindsight, devoted to the maintenance of one or more of the following propositions: First, that whatever is was inevitable; secondly, that whatever is was wisely foreordained; thirdly, that whatever is is for the best; and fourthly, that whatever is is for the worst. Conformably to these points of view, the proponents of the several theories may be classed as fatalists, as providentialists, as optimists, and as pessimists.

That these preconceptions, as popularly entertained, have had, still have, and will continue to have an important and at times a decisive influence upon the course of events, is a fact which should be regarded as almost self-evident. The conduct of a people under given circumstances must always be powerfully affected by the view which it takes of its mission and destiny. If the prevalent tendency be fatalistic, there will naturally be a ready sub-

mission to ills which a more energetic and less acquiescent frame of mind would lead the public to resist and correct. If the popular conviction be providentialist, we may expect the general conduct to be characterized by an energetic self-confidence, with a tendency, perhaps often unconscious, towards the aggressive and occasionally unscrupulous removal of obstacles that stand in the way of what is conceived to be desirable. The same tendency, although it may sometimes be observable, is much less marked in the optimist, whose genial disposition leads him to minimize and even to overlook the obstructions that lie in his path as well as the evils that flourish around him. He is tolerant of the growth and accumulation of unwholesome conditions, because he does not believe that they can produce eventual and permanent harm. His antithesis is found in the pessimist, who, because he can see no permanent good in anything, logically assumes towards the transactions of his time a negative attitude, and looks upon government as something to be tolerated but not to be encouraged.

With all these phases of the popular mind, the historian is obliged to deal. He must detect their existence and observe their opera-

tion. But he ceases to be a trustworthy guide when he identifies himself with any of the classes whose views and tendencies have been described. In proportion as he does this, he ceases to be a historian and becomes merely a moralist.

The primary function of the historian is that of an interpreter of events. In order that he may discharge this function, he must deal with facts as causes rather than as ultimate verities. He should, first of all, tell us what happened, and why it came to happen; and it is only after he has discharged this duty, that he is in a position to assume the rôle of a monitor. It is a notorious fact that important determinations, profoundly affecting the course of history, have been based upon erroneous assumptions of fact or of right or perhaps of both. False information and false legal conceptions may have been the decisive factors. Nevertheless, the false information and the false legal conceptions are, for the purposes of the historian, the causative facts with which he must primarily deal; for it is upon the causative rather than the ultimate facts that an intelligent conception of national character,—of its strength and its weakness, of its power of self-restraint

and its impatience of control, of its dispositions and desires,—can be formed. When the historian has discharged this function, and by correctly interpreting the past has furnished a clue to the possibilities or probabilities of the future, he may properly assume the function of a teacher of morality, and upon the strength of ultimate verities, gleaned from sources which were unknown or not open to inspection, admonish the people of their liability to error, of their mistakes, misdeeds and shortcomings. Reverse the process, and we banish from history the human, the dramatic, the moving elements, and suppress and exclude from our estimation the currents of popular feeling, the workings of the human spirit, which so often override and sweep away the barriers created by political, legal and moral instruction.

Read in the light of the causative facts, it may be affirmed that there is no people whose history is more consistently characterized by the display of certain dominant traits than is that of the people of the United States. Composed in the main of adventurous and enterprising settlers from the countries of Europe, and accustomed to the risks and dangers that attend the colonization and development of a

vast continent previously uninhabited by civilized men, they have ever exhibited a love of liberty and a devotion to popular government, combined with a restless energy, a self-reliance, a directness of action, and a sense of power which have determined their conduct under all the various circumstances that have arisen in the course of their national career.

It was to be expected that a people possessing these characteristics would not indefinitely continue to submit to the old colonial system. The British colonial system was not worse than the colonial systems of the other European powers. It was indeed in some respects the most liberal of all of them; and, under what Burke called the policy of "wise and salutary neglect," the British colonists had enjoyed a large measure of political freedom. In reality the sense of political liberty served only to render the system of commercial restriction the more insupportable. This system was based upon the principle of monopoly, which universally governed the trade relations of colonies in those days. With slight exceptions, the trade of the colony was restricted to exchanges with the mother country. The ships of the mother country were the only vessels

permitted to enter the colonial parts, and the principal colonial products were allowed to be exported only to the mother country.

The American Revolution was the formal and final protest of the people of the United States against this system. It is true that when, as the result of measures taken by committees of correspondence and other local bodies, the Continental Congress first assembled in Philadelphia on September 5, 1774, public opinion had not advanced to the contemplation of measures of separation; but, after Lexington and Concord, events moved rapidly. The crisis was hastened by the royal speech to Parliament of October 26, 1775, the text of which reached Boston and Philadelphia early in the following year. In this speech the king, avowing his belief that the leaders in America had, while protesting their loyalty, been engaged in a conspiracy against him and in preparing for a general revolt, stated that he had increased his naval forces and greatly augmented his land forces, and declared his purpose to "put a speedy end" to the disorders "by the most decisive exertions." Coincidently with the reception of this speech, Norfolk, the most considerable and most flourishing commercial

town in Virginia, was destroyed by Lord Dunmore, entailing a loss estimated at three hundred thousand pounds sterling.

The significance of these events was read and magnified in the blaze of light flashed across the sky by Paine's *Common Sense*, which, as Dr. Rush declared, "burst forth from the press with an effect that has been rarely produced by types and paper, in any age or country." Richard Henry Lee, in a letter to Washington, owned himself convinced by its arguments "of the necessity of separation." Washington, writing to Joseph Reed, January 31, 1776, said: "A few more of such flaming arguments as were exhibited at Falmouth and Norfolk, added to the sound doctrine and unanswerable reasoning contained in the pamphlet *Common Sense*, will not leave numbers at a loss to decide upon the propriety of a separation." The argument of Paine was not, however, solely an appeal for separation; it was also a call to union. "The sun," declared Paine in a burst of eloquence, "never shone on a cause of greater worth. 'Tis not the affair of a city, a county, a province, or a kingdom, but of a continent of at least one-eighth part of the habitable globe. 'Tis not the concern of a day, a year, or an

age; posterity are virtually involved in the contest, and will be more or less affected even to the end of time, by the proceedings now. Now is the seed-time of continental union, faith and honor."

Even before the formal act of separation, the Continental Congress had begun to act as if it represented a new nation. Although its powers were wholly undefined, it organized itself for the conduct of foreign as well as of domestic affairs, and proceeded to appoint diplomatic representatives to the European powers. The Declaration of Independence was made by "the Representatives of the United States of America, in General Congress Assembled, . . . in the name and by authority of the good people" of the colonies; and it declared that the "united colonies" were and of right ought to be "free and independent states," and that as such they had "full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do."

Nor was the Congress backward in asserting the independence which it had declared and the rights which were conceived to be incident

to that condition. Early in the autumn of 1776 it was reported that Portugal had resolved upon the exclusion of American vessels from her ports. In this conjuncture Congress found an adviser whose views were not lacking either in energy or in imagination. Among the most active agents of the United States in foreign affairs at that time was the author of *Le Mariage de Figaro*, Beaumarchais, who, although generally known only as a dramatist, was not devoid of skill in political and diplomatic intrigue. Beaumarchais, perhaps instinctively thinking of stage effects, advised Congress to declare war against Portugal and send a fleet to the Brazils. Spain, long resentful against Portugal, whom she desired to reconquer, would, he argued, be interested, and might be engaged to make a like declaration, and, thus becoming in effect an ally of the United States, would open her American ports to their armed vessels and to their privateers with prizes made upon the Portuguese. England would then be obliged to go to Portugal's assistance, and France, while aiding Spain under the Family Compact, would also have an excuse for opening her ports to the Americans.[1]

[1] Wharton's Dip. Cor. Am. Rev., II, 146. See, also, pp. 148, 188.

This was a scheme ambitious enough to satisfy the most enterprising disposition, but the Congress did not shrink from its contemplation; for, on December 30, 1776, the commissioners to the courts of France and Spain were directed to consult together and prepare a treaty of commerce and alliance similar to that first proposed to France, in which it should be provided that if Spain would join the United States in the war against Great Britain, the United States would aid Spain in reducing the town and harbor of Pensacola, and, in case it should be true that Portugal had insultingly expelled American vessels from her ports, or confiscated any of them, would also declare war against the Portuguese king, if that measure should be "agreeable to and supported by the Courts of France and Spain."[1] Franklin, who summarized these instructions as meaning in effect that the United States, in case France and Spain would enter into the war, would "assist the former in the conquest of the British sugar islands, and the latter in the conquest of Portugal," quietly remarked, in a letter to one of his fellow-commissioners in France: "You will see by the date of the resolution relating

[1] Journals of Continental Congress, VI, 1054, 1057.

to Portugal . . . that the Congress was stout in the midst of their difficulties." [1]

As the war proceeded, with its mingled victories and defeats, the necessity was felt for a closer and more definite association. The capture of Burgoyne and his army at Saratoga led directly and immediately to the conclusion, in February, 1778, of the treaties of commerce and alliance with France. These treaties were designed not only to compel the acknowledgment of independence by Great Britain, but also to assure the continuance of that independence when once it had been established. They looked to the future as well as to the present, and brought a new sense of responsibility as well as of power.

In the same year there were formulated the Articles of Confederation — a loose bond of union, but an important step in the federal direction.

It was not until March 2, 1781, when the ratification of the last of the thirteen States had been secured, that Congress assembled under this new form of government; but, fact running ahead of formula—a phenomenon

[1] Franklin to Arthur Lee, March 21, 1777, Wharton, Dip. Cor. Am. Rev., II, 297.

often produced by pressure of circumstances—Congress had already taken steps to assure a more efficient conduct of foreign affairs. For this the Articles of Confederation did not specially provide. Writing to John Jay, in July, 1780, John Lovell, a member of Congress form Massachusetts, said: "There is said to be a Committee of Foreign Affairs; each member is loaded with a variety of business; two have amiable wives near Philadelphia; I miss the gentlemen, therefore, frequently." In a letter to Franklin in the following October, Lovell stated that he was the only member of the committee then attending the Congress, and that the committee had not had a secretary or a clerk since Thomas Paine's resignation. In these circumstances a committee was appointed to consider a plan for a Department of Foreign Affairs. Its report was presented to Congress on January 10, 1781, and was adopted. The report recited that "the extent and the rising power" of the United States entitled them "to a place among the great potentates of Europe," while their "political and commercial interests" pointed out "the propriety of cultivating with them a friendly correspondence and connexion;" and that, in order to

render such an intercourse advantageous, there must be "a competent knowledge of the interests, views, relations, and systems of those potentates." In order to attain these ends and insure the regularity of correspondence, it was recommended that "a fixed and permanent office for the department of foreign affairs ought forthwith to be established, as a remedy against the fluctuations, the delay, and indecision" to which the existing method of managing foreign affairs was exposed. It was therefore resolved that an office for the department of foreign affairs should immediately be established, and that it should be administered by a Secretary of Foreign Affairs. Robert R. Livingston was appointed to this office.

But, of all the acts which looked towards future union, none was more interesting or more important than the treaty by which the war was brought to a close. Not only was the independence of the United States acknowledged, but a settlement of boundaries was obtained which fairly startled all the world except the self-confident people to whom the concession was made. Reaching far to the North, then running southwesterly to the 45th parallel of North latitude and thence to the St.

Lawrence River, the line continued westerly through the middle of that river and the Great Lakes, till, by a northwesterly deflection, it reached the Lake of the Woods and the Mississippi River. The Mississippi then became the boundary, until, at the 31st parallel of N. latitude, the dominions of Spain were reached on the South. The line was then drawn due East to the middle of the river Apalachicola or Catahouche, then along the middle of that river to its junction with the Flint River, thence straight to the head of St. Mary's River, and down the middle of the St. Mary's to the Atlantic Ocean. Besides acquiring this imperial domain, the people of the United States obtained an acknowledgment of their right to fish on the banks of Newfoundland and in the Gulf of St. Lawrence, and the liberty to take fish on the coasts of the British dominions in America, and to dry and cure fish in the unsettled bays, harbors and creeks of Nova Scotia, Magdalen Islands, and Labrador.

There was, however, in the treaty another clause which, although it would not attract the special attention of the casual reader, was destined to exert an important influence upon the formation of the future federal union. When

the war of the revolution broke out and amicable relations between Great Britain and her colonies were interrupted, large sums were naturally due from the inhabitants of the one country to those of the other for debts contracted in the usual course of trade. In these circumstances, some of the American States during the war passed acts of sequestration and confiscation, which provided that debts due to British subjects might be paid into the State treasuries, and that such payment should constitute an effectual answer to any suits which might afterwards be brought for their recovery. It was foreseen that, after the conclusion of peace, although the courts of the country would once more be open to British subjects, these statutes would serve as a bar to the recovery of debts. In the negotiations at Paris, the British representatives coupled the question of the recovery of debts with that of compensation for the loyalists whose estates in America had been confiscated during the war. When these demands were first brought forward, Franklin and Jay answered that the matter was one that belonged exclusively to the several States. John Adams, on his arrival in Paris, announced a different opinion.

He assumed bold national ground. While opposing the compensation of the Tories, he declared that he had "no notion of cheating anybody;" that the question of paying debts and of compensating Tories were distinct; and that he would agree that Congress should recommend to the States the opening of their courts for the recovery of all just debts. When the treaty was made, it went farther. It did not recommend; it stipulated (Art. IV.) in positive terms "that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts heretofore contracted." By this Article, power was assumed not only to annul the legislation of the States on the particular subject, but to annul it retroactively. In their report to Congress, the American plenipotentiaries, Adams, Franklin, Jay, and Henry Laurens, declared the opinion that it appertained solely to Congress, in whom exclusively were vested the rights of making war and peace, to pass acts against the subjects of a power with which the confederacy might be at war. In this opinion the Congress may be assumed to have concurred, since it ratified the treaty without amendment.

When the stress and pressure of war were removed, the tendency towards federalism was naturally relaxed. The Articles of Confederation, as is well known, were utterly inadequate to the purposes of a federal government, especially in time of peace, when limitations of power were more likely to be strictly kept. As they did not operate directly upon the people, but only upon the States, they tended to confirm the conception that the inhabitants of the various States, which were the successors of colonies previously separate and independent, had no common or national allegiance. The power, which Congress possessed under the Articles of Confederation, to make requisitions upon the States, was in effect only recommendatory. Each State levied its own duties, and made its own commercial regulations. From this condition of things, there resulted not only discord but also feebleness. The people of the United States were not slow to perceive this fact. Their efforts to form commercial agreements were frustrated by their inability to assure uniform action on the part of the several States. The government of the Confederation was unable to create and maintain an army and navy. The frontiers re-

mained undefended. Public credit was abandoned, and loans contracted during the war remained undischarged. Commerce declined; the values of land decreased, private credit was bad, money was scarce and of uncertain value.

Nor was this all; the provisions of the treaty of peace remained unexecuted and ineffective. The treaty had looked to the co-operation of the Contracting Parties in obtaining from Spain the right or privilege of navigating the Mississippi River, but the hope of co-operation proved to be illusory. Immediately after the peace, the Congress of the United States sent John Adams as minister to the Court of London, but the British Government did not deem it worth while reciprocally to send a minister to the United States, where there appeared to be no efficient national authority. When British creditors entered the courts of the several States and sought to recover their debts in conformity with the terms of the peace, the courts held themselves to be bound by the acts of their legislatures, and declined to give effect to the stipulations of the treaty. Meanwhile Great Britain refused to withdraw her forces from the United States, and continued to hold important posts as a guarantee for the

fulfillment of the obligations of the treaty, especially with regard to the recovery of debts. In these circumstances the American people, casting local jealousies for the moment aside, advanced in a practical spirit to the assertion of the nationality which logically resulted from their separation from Great Britain. In the early days of the revolutionary movement, when government was beginning to dissolve, Patrick Henry is reported to have declared that he was "not a Virginian but an American," that "all America" was "thrown into one mass."[1] The need of concert was no less urgent in 1787. Government was again dissolved. It was evident that independence could be saved from failure only by united action, definitely and permanently assured. Provision must be made and made at once for the common defence, the preservation of public peace, the regulation of commerce, and the superintendence of foreign intercourse.

Everyone is familiar with the encomium of Gladstone, that the Constitution of the United States is the most remarkable document ever proceeding at one stroke from the brain and purpose of man. But the most remarkable fea-

[1] Works of John Adams, II, 366-368.

ture of this remarkable document is the directness and completeness with which the framers performed their task. Having set out upon the path of federation, they did not occupy themselves in devising half-way measures and cautious expedients, but sought to found and did found a truly national union. It is a common thing to extol the foresight and provident wisdom of the Fathers; but, while this is altogether proper, those qualities are sometimes dwelt upon so exclusively as to cause us to lose sight of the influence of immediate conditions upon their labors and to be blind to peculiarly obvious historical facts. For instance, we constantly hear the desire expressed for the creation of a court among nations "like the Supreme Court of the United States," for the purpose of settling international differences and ensuring universal and permanent peace. The expression of such a wish carries with it a deserved tribute to the great and useful service daily rendered to the people of the United States by that exalted tribunal, but it evidently overlooks the rather serious episode of the war between the States as well as the circumstance that the deliverance of the Supreme Court in the Dred Scott case was the logical

forerunner of that great convulsion. To say that the Fathers, had they been endowed with supernatural powers, might have foreseen and guarded against such unhappy contingencies, is to cast no reflection on their memory. It does, however, tend to show that they were subject to human limitations, and that their wisdom and foresight were chiefly employed in dealing directly and courageously with the conditions with which they were actually confronted.

By the "Articles of Confederation and Perpetual Union," as the Articles of Confederation were officially styled, each State retained "its sovereignty, freedom and independence, and every power, jurisdiction and right" not "expressly delegated to the United States in Congress assembled." The bond of connection was described as a "firm league of friendship," for common defense, the security of liberties, and mutual and general welfare. The Congress was composed of not less than two nor more than seven delegates from each State, annually appointed in such manner as the legislature should direct; but these delegates were paid by the States and were subject to recall, and each State had but one vote in the Congress.

The privileges and immunities of citizens in the several States were assured to the free inhabitants of each State; privileges of interstate trade and intercourse were likewise accorded; the delivery-up of fugitives from justice was provided for; and it was stipulated that full faith and credit should be given in each State to the records, acts and judicial proceedings of the several States. On the other hand, although the several States were forbidden to send or to receive embassies or to enter into any conference, agreement, alliance or treaty with any foreign power, without the consent of Congress, or to lay any imposts or duties inconsistent with the treaties already proposed to France and Spain, yet the regulation of commerce and the laying of imposts and duties remained in other respects with the several States. It was in fact expressly provided that no treaty of commerce should be made whereby the legislatures of the respective States should be restrained from imposing such imposts and duties on foreigners as their own people were subject to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.

There was granted to the Congress the ex-

clusive power, subject to certain exceptions, to declare war and make peace, but, although the common expenses, including those of war, were to be defrayed out of a common fund supplied by the several States in certain proportions, the laying and collection of the taxes for the paying of such proportions were left altogether to the several States. The Congress was invested with exclusive power to regulate the alloy and value of metallic money; but the power to coin money was shared with the States, which also retained power to appoint regimental officers in the United States army.

The executive power, such as it was, was lodged in the Congress, or, during its recess, in "A Committee of the States," consisting of one delegate designated by Congress from each State. Judicial power there was none, except that Congress had power to appoint courts for the trial of piracies and felonies committed on the high seas and for the determination of appeals in cases of capture. Provision was made for the creation of special tribunals for the determination of disputes and differences between the States concerning boundaries, jurisdiction and other matters, but from the decisions of such tribunals, Congress itself was to be "the last resort on appeal."

Finally, in order that the powers of the Confederation might not be intentionally or inadvertently expanded, it was expressly provided that the Congress should "never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy," unless with the assent of nine of the thirteen States.

To the Articles of Confederation the Constitution of the United States presents a fundamental and almost a complete antithesis.

In the first place, the foundations of national legislative power under the Constitution were laid broad and deep. It is true that the Senate, which is composed of two Senators from each State, chosen by the legislature thereof, represents a compromise. It reflected the old conception of the equality of States, on which

the Articles of Confederation were based. But the compromise was necessary in order to obtain the assent of the several States to the union; and the principle of State equality was discarded in the House of Representatives, whose members were to be apportioned among the several States, according to population. The fundamental point, however, to be noted, is that the legislative power no longer operates upon the States, but operates directly upon the people of the United States. The Senators and Representatives were to be paid out of the Treasury of the United States, and the United States was to raise its own revenues.

The legislative power, as defined in the Constitution, was ample for national purposes. The Congress was invested with power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defense and general welfare of the United States, subject only to the proviso that all debts, imposts, and excises should be uniform throughout the United States. Congress was further invested with power to borrow money on the credit of the United States; to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; to estab-

lish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies; to coin money, regulate the value thereof, and of foreign coin, and to fix the standard of weights and measures; to provide for the punishment of counterfeiting United States securities and coin; to establish Post-Offices and Post-Roads; to grant copyrights and patents; to constitute tribunals inferior to the Supreme Court; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling out the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as might be employed in the service of the United States; to exercise exclusive legislation over the seat of government, and over all places acquired for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

finally, but not of least importance, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." The only express limitations placed upon the power of Congress were the inhibitions to prohibit the slave trade prior to 1808; to suspend the privilege of the writ of habeas corpus except when, in cases of rebellion or invasion, the public safety might require it; to pass bills of attainder, or *ex post facto* laws; to lay capitation or other direct taxes, except in proportion to population; to lay taxes or duties on articles exported from any State; to give a preference by any regulation of commerce or revenue to the ports of one State over those of another; to require vessels, bound to or from one State, to enter, clear or pay duties in another; or to grant any title of nobility.

On the other hand, it was expressly provided that no State should enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a legal tender; pass any bill of attainder, *ex post facto*

law or law impairing the obligations of contracts; or grant any title of nobility. It was further provided that no State should, without the consent of Congress, lay any imposts or duties on imports or exports, except what might be absolutely necessary for executing its inspection laws; that the net proceeds of all duties and imposts, laid by any State on imports or exports, should be for the use of the United States Treasury; and that all such laws should be subject to the revision and control of the Congress. The States were also forbidden, without the consent of Congress, to lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or to engage in war, unless actually invaded or in such imminent danger as would not admit of delay.

Not less remarkable is the executive power vested by the Constitution in the President of the United States; for, owing to their reprobation of the absolute power then exercised by the monarchs of Europe, and their special abhorrence of the arbitrary course of George the III of England, the American people felt a peculiar jealousy of executive authority.

Nevertheless, the powers vested in the President were, like those vested in Congress, ample for national purposes. He was made commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States. He was empowered to require the opinions, in writing, of the heads of executive departments, and to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. The conduct of foreign intercourse was placed in his hands. He was empowered, by and with the advice and consent of the Senate, to make treaties, with the concurrence of two-thirds of the Senators present; to nominate and, by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, and to receive ambassadors and other public ministers. The appointment of judges of the Supreme Court, and of all other officers of the United States, was confided to him, subject to the advice and consent of the Senate. He was also to give to Congress information of the state of the Union, and to recommend to their consideration such measures as he should judge necessary and expedient; to convene both

Houses, or either of them, on extraordinary occasions, and, in case they could not agree as to the time of adjournment, to adjourn them to such time as he should think.

The exercise of judicial power, which was so signally lacking under the Articles of Confederation, was also amply provided for. Such power was vested "in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." The judges of such courts were to hold office during good behavior, and to receive for their services a compensation which should not be diminished during their continuance in office. The judicial power thus vested was declared to extend "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases effecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and

between a State, or the citizens thereof, and foreign states, citizens or subjects."

In addition to the powers thus given, provision was made to assure the recognition in each State of the public acts, records and judicial proceedings of other States, and the citizens of each State were guaranteed all the privileges and immunities of citizens in the several States. The delivery-up of fugitives from justice and the recovery of slaves, as between the several States, were assured. Furthermore, Congress was empowered " to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" and it was provided that the United States should " guarantee " to every State " a Republican form of government," and " protect each of them against invasion," and, " on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

Finally, and most importantly, it was declared that " this Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the

United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The form of this clause, which was obviously designed to secure the subordination of State authority in matters of federal cognizance, was directly due to the difficulty, to which we have heretofore adverted, in securing the performance of the stipulations of the IVth Article of the Treaty of Peace with Great Britain, concerning the recovery of debts. The specification of "treaties made," as well as of those which should be made, was intended unequivocally to embrace the Treaty of Peace. Nor did the clause provide for the nullification of only inconsistent State laws; it equally included the inconsistent provisions of State constitutions. "Anything in the Constitution or laws of any State to the contrary notwithstanding," is the phrase employed; the subordination of State authority to national authority, within the sphere of national action, was made complete.

Immediately after the Constitution was put into operation, ten Amendments were adopted.

They were in the nature of a bill of rights, and were designed to remove objections that had been excited by the broad grants of federal power. By the last of these Amendments, it was declared that powers not delegated by the Constitution to the United States, nor prohibited by it to the States, were reserved to the States respectively, or to the people. By an eleventh Amendment, soon afterwards ratified, suits against individual States by citizens of other States or of foreign countries were excluded from the grant of judicial power.

The American people, having determined upon the formation of a national government, proceeded directly to the accomplishment of that object, establishing, on the basis of a common citizenship, a government which, with its own executive, its own legislature, its own judiciary, and its own military and naval forces, operated directly upon the people as individuals, levied and collected its own taxes, adopted and applied its own legislation, pronounced and enforced its own judgments, and determined for itself questions of war and of peace. In contemplating these results, it is instructive to compare the epoch-making work of the American constitution makers with the great examples

of federal union in Europe—Switzerland and Germany—although in these cases the development of federal institutions not only came about gradually but involved the progressive conciliation of divergent local interests deeply rooted in ancient political institutions and habits of thought.

Even today citizenship in Switzerland is of cantonal rather than of national origin, while the federal executive power is lodged in a body of seven persons called the Federal Council. The members of this body are elected by the federal legislature for terms of three years, and are usually re-elected for successive terms. They act as heads of departments, and are in reality hard-worked officials, who, although they draw modest salaries, spend most of their time at their desks. Their presiding officer or chairman is designated by the federal legislature from year to year. Officially styled the President of the Confederation, and commonly known abroad as the President of Switzerland, he discharges ceremonial functions which ordinarily belong to a chief executive, but his essential powers are only those of a member of the council. The legislature consists of a Federal Assembly, composed of a Council of

States, in which the cantons are equally represented, and a National Council, which is the popular and more numerous and has proved to be the more important chamber. A Federal Supreme Court of limited jurisdiction, composed of nineteen members elected by the Federal Assembly for six years, sits at Lausanne, in the Palace of Justice erected there for its use. In spite of the smallness of the country, the tendency towards centralization in Switzerland has on the whole developed slowly. In recent years, however, the centralizing pace has been greatly accelerated, as the result of the buildings of railroads (substantially all of which the federal government owns and operates), the increase of intercantonal intercourse, and the incidental growth of a desire for uniformity of law. The limited grants of legislative power formerly made to the federal government were extended by constitutional amendment in 1898 so as to embrace both civil and criminal law; and in December, 1907, the Federal Assembly, after mature deliberation, adopted without a dissenting voice a national civil code, which was to come into force on January 1, 1912. In Switzerland as in the United States commerce is the great and in-

exorable factor in the extension of national activities in time of peace.

In Germany, by the Constitution of 1871, the laws of the Empire are within their sphere supreme. There is one citizenship for all Germany, and all Germans in foreign countries have equal claims upon the protection of the Empire. The supervision of the Empire and its legislation comprehend the right of citizenship; the issuing and examination of passports; the surveillance of aliens; colonization and emigration; customs duties and commerce; coinage, and the emission of paper money; foreign trade and navigation, and consular representation abroad; and the imperial army and navy. The Emperor represents the Empire among nations; enters into alliances and other conventions with foreign countries; sends and receives ambassadors; and declares war and concludes peace in the name of the Empire, subject to the proviso that, for a declaration of war, the consent of the federal council is required, except in case of "an attack upon the territory of the confederation or its coasts." The relations of the several States to the Empire and to each other are not, however, wholly regulated by the written Constitution. The

several States preserve the right of legation; as late as 1895 the government of Baden declined to receive representations from the United States on a matter which was considered to be of peculiarly internal concern except through George Bancroft, who, although he had then been gathered to his fathers, was still borne on the records of Baden as American minister to that kingdom. They also grant exequaturs to foreign consuls within their territories, although all German consuls are sent out by the Empire. They may enter into conventions with foreign powers concerning matters not within the competence of the Empire or of the Emperor, and within the limits fixed by the laws of the Empire; even today the relations of the United States with some of the German States in matters of naturalization and extradition are regulated by treaties made with those States before the formation of the Empire. They may also conclude *concordats* with the Holy See. The federal union in Germany is indeed a complex structure; but, although it may be difficult to harmonize it with abstract notions of government, Prince Bismarck was wont to console himself with the reflection that it worked well. But in Germany, just as in

the United States and in Switzerland, the growth of commerce, interstate as well as foreign, accelerates the tendency towards the augmentation of national control and the centralization of power.

LECTURE II

Democracy

The adoption of the Constitution marks the high tide of early federalism. This is far from saying that the spirit of nationality spent itself in the framing of that instrument. But the American people were jealous of authority. This attitude towards government was the necessary result of their situation and antecedents. Living in a new country of vast extent, surrounded on all sides by forces that were antagonistic if not hostile, with savage men to encounter and a wilderness to subdue, they had learned to rely upon their personal strength and resources. Out of these conditions there developed an intense individualism. Accustomed to look to themselves rather than to government for their protection, they were unused to the pressure of administrative control and regarded with jealousy, not unmixed with distrust, the exercise of a strong governmental authority.

The same conditions that made the people individualistic also rendered them democratic.

The colonial charters naturally reflected the aristocratic character of the government from which they emanated. But aristocracy was unsuited to the wilderness. Interdependence and the need of self-help made men feel that they were placed on an equal footing. In such circumstances it was difficult to preserve distinctions of rank or to secure respect for power which was not based upon the merits of the individual. It was merely the play of natural forces as they existed in America that caused aristocracy to decline and democracy to grow. The Revolution was itself a democratic movement, to which, according to the testimony of eminent patriots and the veracious disclosures of later and perhaps more candid historians, a large proportion of "influential characters," of the propertied, office-holding and professional classes, were from first to last opposed.

As has been said, the American people developed an intense individualism. Democracy is not necessarily individualistic; it may on the contrary be highly socialistic; but in the early days of the American Union the grounds for the growth of socialistic principles did not exist. Socialism begins when human wants cannot be gratified without trenching upon the

position of those who have been forehanded in gaining control of the country's material resources. In America the entire continent stretched out before the adventurous settler; it was his almost for the asking if he had the strength, the fortitude and the skill to subdue and defend it. The American democracy was therefore individualistic, and it may be said that individualism grew as democracy grew. Proceeding from the same conditions, they were not antagonistic but progressed and prospered together.

The democratic spirit, inevitably produced by the conditions in which the American people lived, was encouraged, intensified and confirmed by the political philosophy which they espoused on their advent into the family of nations. The idea of democracy, although it flourished in the rich but untilled soil of the American continent, was not born there. Long before the American Revolution it had found expression in the writings of political philosophers in Europe who protested against governmental and ecclesiastical oppressions. The labors and writings of these philosophers specially distinguished the eighteenth century —the most fruitful period in the history of the

world in the inculcation and spread of the principles of liberty. The idea of democracy was systematized and expounded in the doctrine of natural rights.

According to this doctrine the true principles of society and of government were to be traced back to a state of nature. The state of nature was a state of innocence—a sort of garden of Eden—in which evil was unknown. Evil was introduced by man's misdeeds; and in order to protect the innocent against the guilty it was found to be necessary to yield up some of the rights which nature gave in order to insure the preservation of the rest. Thus society was to be regarded as a sort of contract or compact, while government was looked upon as a beneficence only so far as it strictly confined its activities to the repression of what was wrong and the protection of the innocent and helpless against the aggressions and rapacity of the malevolent strong. When government transcended these bounds, it became an evil and its activities were to be regarded as purely tyrannical. Society was to be congratulated when it had as little government as possible, and, according to the current phrase, that government was best which governed least.

Our later political philosophers have been inclined to deride this doctrine; they deny that any such thing as a state of nature, in the sense in which their predecessors used that phrase, ever existed. They consider the theory altogether artificial. Our modern critics however lose sight of the fact that to a great extent systems of political philosophy are but the expression—and often the belated expression—of social evolution, and that in political philosophy as in political economy there is very little that can be regarded as axiomatic or as permanently true. Principles will be regarded as correct or incorrect in proportion as they reflect existing conditions; and until we can affirm that the final stage of political and social evolution has been reached and that no new developments can be made, we shall have no assurance that the political and social theories of today will not be discarded tomorrow, or that the political and social principles discarded today will not be revived and reapplied in the next generation. Whether regarded as true or as false, the doctrine of natural rights is on one ground alone entitled to our deferential consideration; it was the fundamental tenet of those who in the eighteenth century main-

tained the cause of political and intellectual emancipation, and as such it furnished to the advocates of liberty throughout the world a philosophy and a justification.

The Declaration of Independence was permeated with this philosophy and rested upon it for its justification. In its appeal to the world it invoked the laws of nature as well as the laws of nature's God, and upon this foundation, the security of which was not doubted, it proclaimed these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain inalienable rights, among which are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it and to institute new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness. Prudence indeed might dictate, said the Declaration, that governments long established should not be changed for light and transient

causes; and experience had shown that mankind were more disposed to suffer, while evils were endurable, than to right themselves by abolishing the forms to which they were accustomed; but when a long train of abuses and usurpations, pursuing invariably the same object, evinced a design to reduce the people to an absolute despotism, it was their right and their duty to throw off the usurping government and to provide new guards for their future security. Such, it was affirmed, had been the patient sufferance of the colonies, and such was the necessity which constrained them to alter their former systems of government. To show that the history of the reigning king of Great Britain was a history of "repeated injuries and usurpation," all having the direct object of establishing an "absolute tyranny" over the States, the facts were recited to a "candid world."

It has sometimes been the fashion to scoff at this Declaration of Independence as a string of phrases without serious meaning and without a direct and practical application to human affairs. But those who assume this attitude betray a mental bias or confess themselves unfamiliar with or incapable of understanding the

course of American history. The Fathers of the Country have been charged with inconsistency in uttering sentiments of natural right while tolerating the system of slavery. To this charge we may answer, first, that they were generally opposed to the continuance of the system of slavery and looked forward to its extinction; and secondly, that they regarded the African race as inferior to their own, and therefore as not coming primarily within the scope of a declaration of natural rights, when applied to political organization. But, however this may be, we are dealing here with what I have called causative facts, and the great causative fact is that the Declaration of Independence was the charter of the American Revolution; that until the formation of the Constitution of the United States it was the main charter of the American Union; and that it has continued to the present day to animate and inspire the great American democracy in preserving their nationality and their liberties.

The Constitution of the United States, while it furnished provisions for assuring the liberties of the people as well as for establishing a strong national government, was not regarded by its framers as founding a democratic gov-

ernment. At the time when it was formulated and proclaimed the dominant idea in the public mind was that of federalism; the object sought was union, and a government by which union might be obtained and rendered efficient for the purposes immediately to be subserved. One of the arguments made in opposition to the ratification of the Constitution was that it would break down on account of the extent of the territory to which it was to apply. The advocates of ratification, among whom we may particularly mention Madison, met this argument by saying that it was based upon the fallacy of confounding a republic with a democracy. "In a democracy", said Madison, "the people exercise the government in person; in a republic, they assemble and administer it by their representatives and agents; a democracy consequently would be confined to a small spot, a republic might be extended over a large region". The framers of the Constitution had therefore devised a republican form of government.

But, no matter whether the government was technically called republican or democratic, there was no doubt that the popular tide was running strongly in the direction of democracy,

and, as has been remarked, democracy meant individualism, individualism meant political particularism, and in political particularism was found the assurance not only that the rights of the States would be protected against any overweening assumption of national power but also that those who administered the national government would not generally be found to be disposed to press its powers beyond proper limits.

This tenderness towards States' rights, or sympathy with local feeling, whichever we may please to call it, was clearly shown in the Judiciary Act of 1789, by which the courts of the United States were established and their jurisdiction defined. As has heretofore been pointed out, the Congress was empowered by the Constitution to make all laws which should be necessary and proper for carrying into execution the enumerated powers vested by the Constitution in the government of the United States or in any department or officer thereof. By the Constitution the judicial power of the United States was vested in one Supreme Court and in such inferior courts as the Congress might from time to time ordain and establish. The mode in which the Supreme

Court should be constituted was not prescribed, and for the most part its jurisdiction was not defined; and no indication whatever was given as to the form in which the inferior courts should be created or as to the jurisdiction with which they should respectively be endowed. For the execution of the powers thus vested in the government of the United States, Congress passed the act of September 24, 1789, to "establish the judicial courts of the United States." In erecting the courts and prescribing their jurisdiction Congress, it may be assumed, possessed the power, which has since been freely exercised, to prescribe their rules of decision. Uniformity of law in matters of interstate or international concern is an object universally desired and for the attainment of which men are constantly working. But, in order that the Constitution might sit lightly on the people, and that they might not be alarmed by a sudden exercise of national power, it was provided by the 34th section of the Judiciary Act that "the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply".

From this legislation it has been inferred and affirmed that there is no such thing as a common law of the United States, and that when the federal courts came to deal with common-law questions they necessarily had to resort to the common law as they found it in the particular States in which they sat. Beginning with the case of Swift *v.* Tyson,[1] the federal courts have, in spite of this assumption, worked out to a certain extent what they have declared to be a federal common law in matters of interstate concern; but their action in so doing has not ceased to be a subject of legal controversy. It may, however, be said that those who totally deny the possession by the United States of any common law would confer a favor upon us if they would indicate from what other source citizenship of the United States by birth was, prior to the Fourteenth Amendment, universally derived. Citizenship by naturalization was a constitutional status, for Congress was expressly authorized to prescribe a uniform rule of naturalization; but, prior to the Fourteenth Amendment, which declared "all persons born . . . in the United States, and subject to the jurisdiction thereof," to be "citizens

[1] 16 Peters, 1.

of the United States," there was no constitutional definition of national citizenship by birth. Mr. Justice Curtis, in his dissenting opinion in the Dred Scott case, argued that the Constitution adopted as native American citizens such persons as were by birth "citizens" of the several States; but this theory failed to account for the fact that persons born on territory within the jurisdiction of the United States, but not within the jurisdiction of any State, were also regarded as citizens of the United States. We seem indeed to be driven to accept as correct the declaration of the Supreme Court, in 1898,[1] that "beyond doubt" birth "within the sovereignty of the United States" created, by virtue of the rule of the common law operating thereunder, national citizenship.

In the case of the United States *v.* Hudson and Goodwin,[2] in 1812, the Supreme Court of the United States, under the influence of particularistic tendencies, held that the courts of the United States had no common-law jurisdiction in cases of crime. This case related to an indictment for a libel on the President and

[1] United States *v.* Wong Kim Ark, 169 U. S. 649, 675.

[2] 7 Cranch, 32.

Congress of the United States, published in a Connecticut newspaper, charging them with having in secret voted two million dollars as a present to Bonaparte for leave to make a treaty with Spain. The case was certified from the circuit court of the United States for the district of Connecticut to the Supreme Court of the United States on a division of opinion between the judges upon the question whether the court had common-law jurisdiction in cases of libel. The case was not argued either on the part of the United States or on the part of the defendants. The Supreme Court decided that the circuit court had no such jurisdiction. The opinion was delivered by Mr. Justice Johnson, who stated that, as the decision made on a case of libel would apply to every case in which the jurisdiction was not vested by statute, the court had before it the broad question whether or not the courts of the United States could exercise a common-law jurisdiction in criminal cases. This question was, he said, then brought up for the first time to be decided by the Supreme Court, and the court considered that it had been "long since settled in public opinion". In no other case for many years had the jurisdiction been asserted, and the "general acquiescence

of legal men " showed the prevalence of opinion in favor of the negative of the proposition. It was not necessary, he said, to inquire whether the government possessed the power of conferring on its courts a jurisdiction in cases similar to that then pending; it was enough that such jurisdiction had not been conferred by any legislative act. Such, he declared, " was the opinion of a majority " of the court. At the same time he admitted that " certain implied powers must necessarily result " to the courts of justice " from the nature of their institution", such as the power to fine for contempt, to imprison for contumacy and to enforce the preservation of order.

If the question was, as Mr. Justice Johnson stated, new to the Supreme Court, it certainly was previously well known to some of its earlier judges. It first became known to them in the case of Henfield, who was indicted in the United States circuit court at Philadelphia for illegally enlisting in a French privateer. This case was tried in 1793 but was first fully reported in 1849, in the volume of State Trials published in that year by Francis Wharton.[1] The defendant was acquitted, upon a verdict of the

[1] Wharton, State Trials, p. 49.

jury of not guilty; but Judges Wilson and Iredell of the Supreme Court, and Judge Peters of the district court, who sat together in the trial, concurred in holding that all violations of treaties, of the law of nations, and of the common law were, so far as federal sovereignty was concerned, indictable in the federal courts without statute; and this view was sustained by Jefferson, who was then Secretary of State, and by the Attorney General, Edmund Randolph, in an official opinion. Not long afterwards the consul of Genoa was tried before Chief Justice Jay and Judge Peters and was convicted, at common law, for sending a threatening letter to the British Minister.[1] Subsequently came the case of Isaac Williams, in which a similar ruling was made by Chief Justice Ellsworth of the Supreme Court.[2] Such was the state of the law when, says Wharton,[3] Judge Chase, in Worrall's case,[4]—Chief Justice Jay, Judge Wilson and Judge Iredell being no longer on the bench, and Chief Justice Ellsworth being abroad,—"startled both his col-

[1] United States *v.* Ravara, 2 Dallas, 297.

[2] Wharton, State Trials, 90, 652.

[3] 1 Crim. Law, sec. 254.

[4] Wharton, State Trials, 189; 2 Dallas, 297.

league and the bar" by announcing that he would entertain no indictment at common law. The prisoner had in fact been convicted, and the declaration of Judge Chase was made upon a motion in arrest of judgment. Judge Peters, who sat with Judge Chase, maintained the view previously enforced by the federal judges, and in this difference of opinion a mitigated though substantial sentence was imposed upon the defendant. No further judicial discussion of the question appears till 1812; but in 1813, the year after the case of United States *v.* Hudson and Goodwin, the question whether the United States had common-law jurisdiction of crimes came before the United States circuit court in Massachusetts, in which sat Mr. Justice Story, who, although he eventually fell under the strong federal influence of Marshall, was of Republican antecedents in the party sense. Mr. Justice Story, while admitting that the courts of the United States were of limited jurisdiction, contended that, when authority was once conferred upon them, its nature and extent, and the mode in which it should be exercised, must be regulated by the rules of the common law. The inference, he urged, was plain that the circuit courts had cognizance of

all offences against the United States and that, in the absence of statute, they were to be defined and punished according to the common law. The whole difficulty and obscurity had, he said, in his judgment, arisen from losing sight of this distinction. Common law offences against the United States would include "all offences against the sovereignty, the public rights, the public justice, the public peace, the public trade and the public police of THE UNITED STATES." Outside of this, common law offences would remain cognizable by the States, the federal courts taking cognizance only when the offence was directed "against the sovereignty or powers confided to the United States." The district judge dissented, in order that the question might again be brought before the Supreme Court. As appears by the report, a majority of the court were ready to hear the question reargued; but no counsel appeared for the defendant, while the Attorney-General considered that the point was determined in the case of the United States *v.* Hudson and Goodwin, with the result that the court felt itself bound by the authority of that case and so certified to the circuit court.[1]

[1] United States *v.* Coolidge, 1 Gallison, 488; 1 Wheaton, 415.

It is an illustration of how "chimeras dire" sometimes affright the human mind, that, when the suggestion is made that the case of the United States *v.* Hudson and Goodwin was wrongly decided, the propounder of this view is thought to believe in a rank departure from settled principles and the obliteration of State jurisdiction. For this view, however, there is in reality no foundation. The assumptions of jurisdiction in the earlier federal cases related merely to offenses against the authority of the United States, and no one ever proposed to go further or imagined that the government could do so. Had the view expressed in the earlier decisions been adhered to, the situation today would in substance have differed slightly, if at all, from that which actually exists. In course of time the whole field of crimes against the United States has been covered by statute, and many crimes have been created which were not offences at common law. Moreover, in the enforcement of this statute law, in which crimes are often merely designated by name, it has constantly been necessary to appeal to the general common law,—and not to the common law of any particular State,—for rules for the exercise of the jurisdiction conferred upon the

courts, and for the definition of the designated offences.

The decision of the Supreme Court, in the case of the United States *v.* Hudson and Goodwin, shows that that tribunal was not disposed to exaggerate the powers of the national government, or to sanction any attempt on the part of that government to usurp authority; but, after 1811, a majority of the members of the court held their appointment from administrations of the Republican or anti-Federalist party. It is true that decisions were made which confirmed and tended to extend the sphere of action of the national government; but the most of these decisions,—although they were criticized at the time, — have received the general approval of the public as being based on unimpeachable constitutional grounds. The court declared the invalidity of State laws impairing the obligations of contracts,[1] but this was in obedience to the express provision of the constitution that no State should pass any law causing such impairment. The supremacy of the judgments of the courts of the United States was upheld, as against inconsistent State laws,[2]

[1] Fletcher *v.* Peck, 6 Cranch, 87.

[2] United States *v.* Peters, 5 Cranch, 136; Cohens *v.* Virginia, 6 Wheaton, 264.

but this was a logical inference from the express declaration that the Constitution and the treaties and laws made in pursuance thereof should be the supreme law of the land. It was held that the United States might incorporate a bank free from the taxation, control or obstruction of any State,[1] but this was only a deduction from the authority conferred upon Congress to make all laws necessary and proper to carry into effect the powers vested by the Constitution in the government of the United States. It was affirmed that the power of Congress to regulate commerce embraced all the various forms of intercourse including navigation, and that "wherever commerce among the States goes the judicial power of the United States goes to protect it from invasion by State legislatures,"[2] but the Constitution expressly gave to Congress the power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

To the rule that the constitutional opinions of the Supreme Court in the earlier decades of the nineteenth century continue to be received

[1] McCulloch *v.* Maryland, 4 Wheaton, 316, 421.

[2] Gibbons *v.* Ogden, 9 Wheaton, 1; Brown *v.* Maryland, 12 Wheaton, 419.

as authority, perhaps the chief exception is that which was delivered by Marshall in the Dartmouth College case.[1] This case grew out of a contest between two rival boards of trustees, one of which was composed of the successors of the original incorporators under royal grant, and the other of persons appointed under an act of the legislature of New Hampshire, which had undertaken to inquire into and regulate the affairs of the institution. It lies beyond our present purpose to trace the curious judicial history of this case and the legal jockeying by which it was characterized.[2] In behalf of the successors of the original incorporators it was contended that the action of the State of New Hampshire in attempting to interfere with the exercise of powers under the royal charter had violated the prohibition placed by the Constitution upon the several States to pass any law impairing the obligations of contracts; in other words, that acts of incorporation constituted contracts which the State legislatures could

[1] Dartmouth College *v.* Woodward, 4 Wheaton, 518.

[2] The Dartmouth College case and the Supreme Court of the United States, by John M. Shirley, 1879; A Legal Mummy, or the present status of the Dartmouth College case; An address delivered before the Vermont Bar Association, October 28, 1885, by Aldace F. Walker, President.

neither alter nor revoke. Everyone has heard of the argument of Webster in favor of the contention of the old board. Perhaps fortunately for this contention, the court did not afford an opportunity to William Pinkney of Maryland, the leader of the bar of the United States in his day, to be heard on the other side, and, without having enjoyed the advantage of Pinkney's great powers of argument and of oratory, decided in favor of the old board.

The decision, although it preserved the rights claimed under the royal grant in the principal case, proved to be utterly ineffective to accomplish the general purpose which it was at the time apparently thought to serve. Its effect has been greatly circumscribed by later decisions even as regards prior acts of incorporation; but for the future its effect was promptly nullified by the inclusion by State legislatures in their grants of incorporation of express reservations of the right of amendment and repeal, and by the passage of general laws declaring all charters thereafter granted to be subject to alteration, amendment and repeal.

Meanwhile the cause of democracy was making general progress throughout the States. The so-called Federalist party, coming to be

identified not so much with the national aspirations that produced the Constitution as with certain policies in domestic and foreign affairs of unpopular tendency, lost its following and ceased to exist, the surviving adherents of its later creed often becoming the exponents of chronic dissatisfaction and discontent, and sometimes even of disloyalty, rather than of federalism. Men like Jefferson, Madison and John Dickinson, who as advocates of a constitution were Federalists in 1787, resumed their place as leaders in the popular agitation which, distinctly reappearing as early as 1791, carried on to further victories the democratic movement of which the Revolution was itself the product.

The popular party, first called Republican, became Democratic-Republican, and then simply Democratic, and, eventually coming to embrace for a time substantially the entire population, divided on personal rather than on political lines. The election of the President was practically taken from the hands of the small and select electoral body in which the Constitution had placed it and was transferred by popular action to the people themselves. Candidates came to be nominated by national con-

ventions, and it was for the purpose of casting their ballots for the one candidate or the other that the electors in the several States were chosen.

This revolution in national methods was only a reflection of what had been going on in the several States. The States had been becoming more and more democratic in their constitutions and government. There is nothing to marvel at in this process when it is reflected that the doctrine of natural rights proclaimed by the Declaration of Independence,—a proclamation which formulated but did not create the popular belief,—had found its way into one after another of the State constitutions. Virginia, in her anticipatory bill of rights adopted at Williamsburg on June 12, 1776, which was afterwards prefixed to her constitution, declared that "all men are by nature equally free and independent, and have certain inherent rights, of which when they enter into a state of society, they cannot, by any compact, deprive and divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety;" that "all power is vested in, and con-

sequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them;" and that a majority of the community had "an indubitable, inalienable, and indefeasible right to reform, alter, or abolish" their government in the manner "most conducive to the public weal." Similar clauses may be found in the constitutions soon afterwards adopted by Maryland, North Carolina, Pennsylvania, and Vermont. New York, in her constitution of 1777, incorporates the Declaration of Independence in its entirety. Affirmations of popular rights, of the inherence of political power in the people, and of the right to alter government so as to subserve the public interest, as therein proclaimed, may indeed be found in almost every State constitution since adopted.

In the colonial times the right of suffrage was closely restricted. It is difficult to generalize on the subject, owing to the diversity of the conditions which prevailed in the different colonies; and it is beyond our present purpose to enter into a minute examination of the provisions of the various colonial charters. In some instances, special moral qualifications were prescribed; in others, religious tests were

exacted; but everywhere property qualifications were imposed.

In the constitutions which the States began to adopt in 1776 religious qualifications were in two instances—New York and South Carolina—retained, and in most cases some qualification of property was still prescribed.[1] But, with the progress of the democratic movement, the property qualification gradually disappeared. By the constitution of Connecticut of 1818 all white male citizens of the United States, twenty-one years old, of good moral character, who either (1) possessed a freehold estate of the annual value of seven dollars, or (2) had performed certain military duties, or (3) had paid a State tax within a year, were declared to be qualified electors. In Delaware, by the constitution of 1776, the suffrage was confined to freeholders, but by the constitution of 1831 it was given to all resident citizens. Georgia as early as 1798 required only citizenship and residence and the payment of all taxes levied dur-

[1] Thorpe, in his Constitutional History of the American People, gives (vol. 1, pp. 93-97) a table of the qualifications of electors prescribed by the various constitutions from 1776 to 1800. He estimates that there were during that period about 150,000 voters, or from 15 to 20 per cent. of what the number would have been on the basis of to-day.

ing the year preceding the election. The property qualifications exacted of electors in Maryland by the constitution of 1776 were abolished by an amendment in 1810. Subject to the requirement that lawfully assessed taxes must have been paid, we find in the constitutions of Massachusetts of 1780 and 1820 a similar transition. In New Hampshire, by the constitution of 1784, every adult male inhabitant of a town and parish, with town privileges, who had paid a poll tax, was invested with the franchise. A property qualification prescribed in New Jersey in 1776 was done away with in 1844. A similar qualification preserved in New York in 1777 was modified in 1821 and abolished in 1846. In North Carolina electors of senators were required to possess a freehold of fifty acres of land, but electors of members of the more numerous branch of the legislature need only have paid public taxes. Only the payment of public taxes was required in Pennsylvania as early as 1776. The record of Rhode Island is exceptional, but the franchise was liberalized in 1888. In South Carolina, in 1778, electors embraced only those who, besides acknowledging the being of a God and believing in a future state of rewards and punishments, possessed a freehold

of at least fifty acres of land or a town lot, or had paid taxes equivalent to a tax on fifty acres. This was modified in 1790, and in 1810 the property qualification was done away with in the case of a person who had actually resided in the election district six months. Virginia by her earlier constitutions restricted the suffrage to freeholders, leaseholders, and tax-paying heads of families; but by the constitution of 1850 it was extended to all white male citizens who had resided in the State two years and in the voting district a year. In the new States that were admitted to the Union, especially after 1800, any conditions beyond those of citizenship, residence, and legal age were rarely affixed, and, if originally imposed, were soon abolished. This was only what was to be expected in the vigorous young commonwealths of the West, where democratic individualism had an unobstructed sweep and flourished for the benefit and example of the whole country. Indiana went so far in her constitution of 1851 as to provide that every voter of good moral character should "be entitled to admission to practice law in all courts of justice"—a privilege only lately done away with.

Meanwhile, the requirement of property

qualifications for State offices, executive and legislative, and particularly for that of member of the Senate or of the House of Representatives in the State legislature, progressively disappeared—in Pennsylvania in 1790, in Maryland in 1837, in Massachusetts in 1840, in New Jersey in 1844, in New York in 1846, in Virginia in 1850, in New Hampshire in 1852. In Delaware they were retained after 1831 only as to senators. They survived down to the civil war in the two Carolinas. In the new States they were rarely exacted, and, where imposed, were soon removed.

Nor was the popularizing of governmental institutions confined to the executive and legislative departments. Under the Constitution of the United States the federal judges were and still are appointed by the President, by and with the advice and consent of the Senate, for life or during good behavior, and are removable only by impeachment. In the States the judges of the various courts were appointed by the governor or by the legislature during good behavior or perhaps for a term of years. In Vermont, under the constitution of 1793, the judges of the supreme court and of the several county and probate courts were elected an-

nually by the legislature, in conjunction with the council, and it was not until 1870 that the term of the judges of the supreme court was extended to two years and their election made biennial. In Georgia, in 1812, it was provided by constitutional amendment that the judges of the inferior courts should be elected for four years by the persons qualified to vote for members of the general assembly. In 1832 the people of Mississippi, on an enthusiastic but lasting rebound from the aristocratic tendencies of their first constitution, took the bold step of making their entire judiciary elective by popular vote. As the debates in the constitutional convention were not reported and preserved, the reasons which were given by individual members for supporting so important a change in the judicial system cannot be quoted; but judging by the reports of what took place in other constitutional conventions on similar occasions, it may be inferred that the main cause was the wave of democratic feeling then sweeping over the country, probably reinforced by complaints of misconduct or inefficiency on the part of individual judges in Mississippi or elsewhere. By the constitution of 1832, the judicial power in Mississippi was

vested in a high court of errors and appeals, and such other courts of law and equity as were provided for in that instrument. The high court of errors and appeals was to consist of three judges who were to be chosen by the qualified electors of each of three districts into which the legislature was to divide the State. The term of the judges so elected was limited to six years, and the judges were to vacate their offices in two, four and six years, respectively, so that one judge should be elected every two years. Vacancies were to be filled by executive appointment only if the unexpired term did not exceed one year, and each judge must be at least thirty years of age. Certain courts were established with judges to be elected for a term of four years. These judges must have attained the age of twenty-six years. There were also to be established probate courts with judges to be elected for two years.

The method thus introduced was soon adopted in other States and in time the popular election of judges became the general practice. The change was unquestionably due to the growth of democratic principles. But it may be doubted whether it was a necessary corol-

lary from such principles. The primary duty of a judge is to administer the laws as between man and man and as between man and the government impartially and without sense of private obligation, hope of personal reward or fear of displeasure. As judges are only men, they will in any event be more or less subject to the influences of the great movements of human thought and feeling going on about them. Beyond this it is not desirable that they should be subject to impressions from sources outside the sphere of their judicial duties, and it would be difficult to show that popular rights have gained either in extension or in security as the result of placing the names of judges upon party ballots. Certain it is that, if there be any foundation whatever for one half of the criticisms heard today of the decisions of elective judges, the experiment has fallen far short of the measure of complete success. In well known instances the people have rebuked flagrant attempts to subject judicial candidates to the dictates of political managers; but, in spite of this fact, confidence in the judiciary has not infrequently been impaired by the general distrust of the sources from which nominations were derived. A system under which the rights

of suitors and of the people at large may be exposed to impairment at the hands of magistrates who lack that sense of security and independence which is so essential to judicial rectitude, cannot be regarded as necessarily and essentially democratic. It is the function of the judge to administer the law as it is, and to declare the law as he finds it. If the laws need to be changed the legislature can change them. Judges are not immortal and their terms, unless some constitutional provision stand in the way, can be limited, to say nothing of impeachment or other process provided for their removal.

Whether in the first instance the sentiment in favor of the popular election of judges was in any respect due to opposition to the assumption by the courts of the then novel power of declaring acts of the legislature to be invalid, the lack of reports of the debates in the earlier constitutional conventions renders it impossible certainly to say. It was laid down by Blackstone that acts of Parliament contrary to natural law would be invalid, but no court had ever been found in England to apply this view. An echo of the doctrine may be heard in some of the early American decisions in which an

attempt was made to put the theory into practice. It became a reality when, after the adoption of the written constitutions, the courts of the United States and of the various States began to declare acts of Congress and of the State legislatures to be unconstitutional, in order to preserve the symmetrical proportions of those fundamental charters. Acts of the State legislatures which violated the Constitution of the United States were necessarily invalid, because it was expressly declared that the Constitution, and the treaties and laws made in pursuance thereof, should be the supreme law of the land, anything in the laws or even in the constitutions of the several States to the contrary notwithstanding. As regards the federal government, the constitutions and laws of the States were the acts of subordinate authorities. But, when a United States court declared a federal law to be unconstitutional, or a State court declared an act of the legislature to be invalid because it was conceived to be inconsistent with the local constitution, there was presented a manifest contradiction of opinion and of conduct as between co-ordinate branches of the government. It was therefore doubted whether such an exercise of power by the judiciary was

admissible; in other words, whether the courts were the exclusive interpreters and sole guardians of the purpose and meaning of constitutional provisions. The action of the courts was thus necessarily brought into the arena of public discussion. For, the questions with which the courts dealt when they declared acts of legislation to be unconstitutional were not always in the ordinary sense judicial but were sometimes essentially political, involving the application of principles of construction on which the judges inevitably divided according to their political creeds. This certainly was an argument—and one not wholly devoid of force—for committing the election of judges to the people and making it a party question.

The same argument has lately been advanced in favor of rendering the judiciary still more responsive to popular opinion, by subjecting the judges, as has been done in certain places, to "recall." In Oregon, for instance—a State in which the judiciary is elective—any public officer who has occupied his place for six months may, under a constitutional amendment adopted in 1908, be "recalled" by the filing of a petition signed by twenty-five per cent of the number of electors who voted in his dis-

trict at the preceding election. The petition must state the reasons for the recall; and if, within five days after it is filed, the officer does not resign, the question of his recall is then authoritatively determined by a special election which must be ordered to be held within twenty days, and at which the reasons for the recall and the officer's justification may respectively be set forth on the ballot in not more than two hundred words—a limitation implying, in the possible case of differences upon questions of law, the possession by accused judges of a power of illuminative condensation the benefit of which it would be a misfortune for the bench, the bar and the public to lose. I have said that the question of recall is authoritatively determined by the special election, but the determination is not necessarily final; for a second petition may be filed if the petitioners first reimburse the government the cost of the previous recall election. Such being the nature and operation of the process, it is obvious that the "recall" is in principle directly opposed to the supposition which, in spite of the elective system, has continued to be entertained, that men must rely upon independent judges, equipped with the

special learning of their profession, rather than upon popular judgments, for the correct interpretation of the laws and the impartial administration of justice.

Of character less doubtful, as a genuine product of democracy, is the common or public school system which universally exists throughout the United States. With the extension of the elective franchise the conviction deepened that the success of government depended upon the intelligence of the masses, and together with this feeling there grew the desire to afford to all men as far as possible an equal opportunity to rise. Influenced by sentiments such as these, the public authorities in the several States, responding to the general demand, provided with increasing liberality the facilities for popular education, at first in the lower but eventually also in the higher grades of study. And while it cannot be denied that high-sounding titles, such as that of "university," have often been bestowed upon schools not even of collegiate rank, yet it is equally true that certain State universities occupy today a place among the strongest, most progressive and most useful institutions of learning in the country.

The great democratic movement, while it was

producing such far-reaching results in the life of the people at home, was also naturally reflected in the conduct of foreign affairs. As was to be expected, sympathy with assertions of the right of self-government was instinctively manifested. The revolutions in South America were enthusiastically hailed as a continuation of the movement for the emancipation of America from colonial administration. But, the interest of the American people was not confined to the American continents. Memorials were presented to Congress and resolutions adopted by State legislatures in favor of the recognition of the independence of Greece. There can be little doubt that the conservative action of the responsible authorities of the government in refraining from encouraging this movement scarcely reflected the state of popular feeling. This feeling was perhaps more correctly expressed by a gentleman in the western part of the State of New York, who, in a letter to James Campbell, once leader of Tammany Hall, declared that he could furnish "five hundred men six feet high with sinewy arms and case hardened constitutions, bold spirits and daring adventurers who would travel upon a bushel of corn and a gallon

of whiskey per man from the extreme part of the world to Constantinople," while, if the Holy Alliance should take sides with Spain against her former American colonies, "our backwoodsmen would spring with the activity of squirrels" to the assistance of the latter.[1] If in France, for instance, a monarchy was overthrown and a republic set up in its place, the minister of the United States was expected to be the first to recognize it and to extend to it a cordial welcome. In no case was the popular attitude more strikingly exhibited than in that of Kossuth and the Hungarian revolution. A special and confidential agent was sent by the Secretary of State to Europe to watch the course of events, and, if Hungary should appear to be able to maintain her independence, to enter into relations with her government. Before this agent could reach Hungary the revolution had practically come to an end. But popular interest in the affair did not subside. Kossuth and many of

[1] The letter here quoted, which the present writer first saw some years ago by courtesy of its custodian, has lately been published in her volume (pp. 40-42) entitled "As I Remember: Recollections of American Society during the Nineteenth Century. By Marian Gouverneur. New York and London, D. Appleton & Co., 1911."

his associates were detained in Turkey, where they had sought refuge after the failure of the revolution; and the President was authorized, if they should wish to emigrate to the United States, to bring them over in a public vessel. The U. S. S. *Mississippi*, which was despatched on this mission, received on September 10, 1851, at the Dardanelles, Kossuth and his family and fifty-five other persons. At that time Europe was in a democratic ferment; and at various ports in the Mediterranean at which the *Mississippi* called demonstrations in honor of the distinguished passenger were made by democratic societies more or less tinctured with revolutionary ideas. At Gibraltar, Kossuth left the *Mississippi* and proceeded to England, where a great ovation awaited him. He arrived at New York early in December, and there and at many places in other States which he visited he was acclaimed by applauding multitudes. He was received by both Houses of Congress, and was entertained by that body at a banquet at which the President of the Senate, assisted by the Speaker of the House of Representatives, presided, and at which Daniel Webster, who was then Secretary of State, made a speech that led to the immediate depar-

ture of the diplomatic representative of Austria from Washington. It is recorded of William H. Seward, then a senator of the United States and later to become Secretary of State, who was also present at the banquet, that his demonstrations of applause by hands and feet and voice were excessive. As party men Webster and Seward were Whigs, but as candidates for public favor they marched with the democratic masses and even sought to figure as leaders among them. Shall we begrudge these careworn statesmen, one nearing the end of his career and the other approaching his zenith, the pleasant sensation of plunging with all the ardor and indiscretion of youth into the tumult and effervescence of the day?

In 1853 the Department of State instructed the diplomatic representatives of the United States that they should, so far as they could do so without impairing their usefulness to their country, appear at foreign courts "in the simple dress of an American citizen," this being, as it was conceived, a proper manifestation of devotion to republican institutions. The Secretary of State who issued this order was William L. Marcy, a statesman whose name stands high among those of the ablest men who have

occupied that great office. Marcy was a democrat not only in the party sense but also in the philosophical sense—an experienced statesman and an able administrator, but in his habits a model of unaffected simplicity. His democracy he had learned in the State of Massachusetts, in the days when it cost something to be a "Republican" in that great commonwealth. It was a favorite jest of my old friend, the late Dr. Francis Wharton, that the supreme court of Massachusetts once decided that Democrats were *ferae naturae* and might lawfully be shot on sight. Marcy escaped with his life and early settled in the State of New York, but not until he had, according to his own account, been made to feel that his principles were reprobated by the community in which he lived. This, he said, no doubt with perfect truth, for he was a sturdy character, served only to confirm his devotion to them.

The democratic influence, as inspired by the Declaration of Independence, is further shown in the advocacy of the doctrine of expatriation. It was maintained that the right to "liberty" and the "pursuit of happiness" embraced incidentally a right on the part of the individual to expatriate himself at will. This view was

opposed to the doctrine of the common law, to which the courts generally adhered. But the executive asserted the right of expatriation in limited forms till James Buchanan, as Secretary of State under Polk, declared it to be unconditional. This contention Buchanan, when President, renewed. It was reaffirmed by Congress in the broadest sense by the act of July 27, 1868. Beginning with the naturalization treaty with the North German Confederation, signed at Berlin February 22, 1868, a partial but substantial recognition of the claim along practical legal lines has been obtained by treaty from various governments.

The political importance of the question of expatriation was decidedly enhanced by the great increase of immigration after the first quarter of the past century. The French Revolution and the striking success of the republican experiment in the United States had wrought a profound change in European thought and feeling. The arrangements of the Vienna Congress and the plans of the Holy Alliance were swept away by the rising tide of nationalism. Before the middle of the century all Europe seemed to be in a democratic ferment. Paris, Vienna, Budapest, Frankfort,

Berlin and all parts of Germany and Italy were in a state of revolutionary commotion. Proceeding from such conditions, many of the immigrants of the time looked to the United States not more as the land of opportunity than as the land where would be fulfilled their dreams of civil and political liberty. To learn that they embraced men who did not hesitate to risk their lives as apostles of liberalism and whose presence added strength to the democratic cause, we have only to recount the names of Schurz, Sigel, Brentano, Blenker, Hecker, and Osterhaus, and last, but not least—honored in both hemispheres—that of the living Jacobi. If they lived to learn that even in America the practical and the ideal are not always the same, and that in politics the word "practical" may sometimes convey a sinister meaning, it may nevertheless be said that, without rancor towards their native land, they continued to bear on, in a spirit of devotion to the land of their adoption, the standard of democracy and freedom as the symbol of their service and their faith.

For certain causes, which will be more fully discussed in the succeeding lecture, the later course of the great democratic movement, which

may be said to have reached its highest level in the decade from 1850 to 1860, was overclouded by the ominous mutterings of sectional contention and strife. Such developments are not to be regarded as being due to or as having any legitimate connection with the democratic movement itself. On the contrary, it is not to be doubted that the general sentiment of the great American democracy always was and always continued to be strongly national.

The War of 1812 was a popular struggle advocated and brought on by leaders who faithfully reflected popular sentiment.

The same thing may be said as to the genesis of the Monroe Doctrine. This was, in its origin, a defiance to those who would suppress independent governments and restore the system of commercial monopoly and political absolutism on the American continents. It was in this sense that it found an enthusiastic response in popular opinion. That it did not lead to more intimate political relations with the governments of Latin-America was due to various causes, among which were distance, limited trade relations, and differences in origin, in language and in manners. An appreciable effect must also be ascribed to the existence of

slavery in the United States and its restraining influence upon the conduct of foreign relations. The states of Spanish-America had publicly reprobated slavery and declared its abolition. They early espoused the cause of Haiti and Santo Domingo, whose independence the United States refused to recognize till 1862. Moreover, it was evident that the Monroe Doctrine possibly might involve wide responsibilities. Buenos Aires was more than twice as far from New York as New York was from London. Only a great augmentation of the army and navy could place the United States in a position to enforce the doctrine if the government should be called upon to do so; and such an augmentation would excite alarm as a menace to the power of the States to preserve and defend their particular institutions. All these elements must be taken into account in the study of the problem.

Again, in the case of the Mexican War, a strong national sentiment was clearly manifested. Here we find the opponents of slavery arrayed against the policy of the government, because they believed that it would result in an extension of the territory in which slavery existed and thus increase the power of the sup-

porters of that institution. The war took place under an administration that was Democratic in the sense of party politics, but in the ensuing national campaign the Whigs took care to nominate as their candidate the military commander whose victorious career had most appealed to the popular fancy. This was not a mere coincidence; it was a recognition and an acknowledgment of party necessities. It took Abraham Lincoln, beloved as he was of the common people, ten years to recover from his opposition to the war, although as a member of Congress he voted for the appropriations to carry it on. He was confronted with the ghost of his opposition when he came to the great debate with Douglas in 1858. As an American statesman who had witnessed the scene once remarked to me, the popular sentiment in favor of the war swept down the valleys of the Ohio and Mississippi like a tempest across the prairies. But for the question of slavery, it may be affirmed that popular sentiment in favor of the annexation of Texas would have been substantially undivided.

The spirit of democracy was not sectional. On the contrary, it was broadly patriotic and national. True it is that it was Daniel Webster,

the Whig, who uttered those eloquent words, "Liberty and Union, now and forever, one and inseparable;" but it was Andrew Jackson, the leader of the Democratic party and a democrat in the broadest sense, who met the first advance of nullification with the unequivocal declaration, "Our Federal Union: It must be preserved." These kindred and indeed identical declarations merely gave voice to the national spirit of the American democracy.

LECTURE III

Imperialism

The triumphant march of the American democracy—triumphant in the spread of political and civil liberty as well as in the general diffusion of material benefits — was suddenly interrupted by the operation of causes whose existence can only be deplored. At the close of a decade, than which there has in most respects been none more happy in American history, dark clouds began to gather. It was difficult to believe, nor did there exist among the people at large any general belief, that a storm was about to burst over the land, uprooting settled traditions and playing havoc with political practices and habits of thought. On the contrary, a sense of confident immunity, growing out of exceptional and almost excessive good-fortune, made the people incredulous as to predictions of impending trouble.

Moreover, the mutterings of impending disaster were due to controversies growing out of the presence of an institution which was essentially an excrescence upon the body politic

—an institution not indigenous to the soil or congenial to American theories of government and of individual right, but exotic and in large measure accidental. The introduction of African slavery into the British colonies in America, even if it could be considered at the time as a demerit at all, was not the work of any section or of any particular part of the inhabitants. Although, after the decision of Lord Mansfield in Sommersett's case in 1772,[1] the relation of master and slave ceased to be recognized in England, slavery legally existed in the British colonies in America, and the trade was carried on by those at the North as well as by those at the South. In the course of time, the holding of slaves became localized in the South, as the result of the fact that conditions of climate and of soil in that section were favorable to the production of staples in the cultivation of which slave labor could be conveniently employed. In the latter half of the eighteenth century, concurrently with the efflorescence of the doctrine of natural rights, there came into existence a worldwide reprobation of slavery as an institution—a feeling of which

[1] The Case of James Sommersett, a Negro, 20 Howell's State Trials, 1; Somerset v. Stewart, 1 Lofft's Reports, 1.

the decision in Sommersett's case was but the reflection. This sentiment extended to the British colonies in America, and after the American revolution was shared by political leaders in the South as well as in the North. It found concrete expression in the convention of 1787; for, although the Constitution of the United States recognized slavery and provided for the protection of the rights of the master over the slave, it empowered Congress to prohibit the importation of slaves after 1808. In due time an act was passed [1] to prohibit such importation after the first of January in that year. As early as 1794, the carrying-on of the slave trade from the United States to any foreign country was expressly prohibited.[2]

In spite of the fact that, partly as the result of the invention of the cotton-gin, the apparent profit of slave-holding and the actual value of slaves in the South were largely increased, the feeling that prevailed among earlier Southern statesmen, such as Washington, Jefferson, and Madison, that the system of slavery should be done away with, did not cease to be entertained

[1] March 2, 1807.

[2] Act of Congress of March 22, 1794.

in the South. It is true that, during and after the civil war, when memories were shortened and visions of the past distorted by the passions of conflict, the view was industriously propagated and widely accepted that at an early day the profits derived from servile labor, especially in the cultivation of cotton, blinded all the people of the South to the evils about them and welded them into one consistent mass of advocates and defenders of slavery. This misconception is now gradually but surely disappearing before the advance of historical investigation. It is estimated by an eminent authority that out of the population of the slave-holding communities not more than one in thirty-three was a slaveholder; that scarcely one white family in five had a property interest in slaves; and that, of the slaveholders of the South, only a little over one-fifth owned more than one slave each, while four-fifths owned less than ten.[1] The great majority of the soldiers of the Confederacy were not owners of slaves. The same thing may be said of Robert E. Lee, Joseph E. Johnston, and A. P. Hill, and doubtless of other famous military chieftains. Slave holding, like slave sentiment,

[1] Hart, Slavery and Abolition, 67-68.

was unequally distributed. The situation in South Carolina and Mississippi differed widely from that in Virginia and Tennessee. Out of 143 emancipation societies in the United States, in 1826, it is stated that 103 were in the South. In Virginia, as late as 1832, forty years after the invention of the cotton-gin and less than thirty years before the civil war, there was in progress, in the legislature and among the people, an active movement in favor of the gradual emancipation of the slaves, — a movement in which a grandson of Jefferson, representing one of the largest slave-holding counties of the State, was one of the leaders. Virginia was indeed but a single State; but, of all the States in the South, if not in the Union, she was the one the most venerated and the best beloved. Among the fathers of the country her sons were pre-eminent; she was rightly called the Mother of Presidents. Her continued leadership in the cause of emancipation would have exerted an influence which, combined with the public opinion of the world and the fuller understanding of economic forces, would have been of inestimable value; but the efforts of her emancipationists were frustrated and the further prosecution of their labors was rendered impossible by

the breaking-out of the violent abolitionist agitation outside.

It is unnecessary here to enter into the question of the personal merits or demerits of the abolitionist agitators, either collectively or individually — to extol their virtues or to censure their defects. We deal with causes and effects, and with personal traits and motives only in this sense. It is a fact, which their warmest partisan would hardly deny, that they placed the accomplishment of their cherished object above the preservation of the Constitution and the Union. They did not seek to conceal this view; on the contrary, they ostentatiously avowed it and conspicuously proclaimed it, Garrison eventually hoisting to the masthead of the *Liberator* the declaration that the Constitution was "a covenant with death and an agreement with hell," involving both North and South in "atrocious criminality," and that it should be "immediately annulled." It is needless to dwell upon the profound and radical change wrought in the situation by the introduction of this method of warfare, carried on in terms of unmeasured denunciation and encouraging and supporting local enactments to

defeat the execution of constitutional provisions. Lincoln, in his eulogy on Henry Clay, more than twenty years after the abolitionist crusade began,[1] while holding up to censure those who for the sake of perpetuating slavery assailed the principles of the Declaration of Independence, also reprobated, as objects of "just execration," those who for the sake of immediate abolition would "shiver into fragments the Union of these States" and "tear to tatters its now venerated Constitution." The effect of the new agitation, besides paralyzing Southern efforts for emancipation, was to transform the controversy from one over moral right into one over legal right, with the result that men united in protecting, even to the point of war, the legal right, who differed utterly as to the moral right. The distinction is plain and is constantly acted upon.

To say that to defend one's rights against a peremptory demand for their abandonment is to fight for the doing of all that the law allows to be done, is an assertion not justified by logic. To go further and assume that the demand will be rendered more persuasive by being couched in the language of vituperation, is to disregard

[1] *The Liberator* first appeared January 1, 1831.

the most elementary manifestations of human nature. The control of its fiscal system being one of the rights of an independent state, he who, because of his belief in free trade, should refuse to join in repelling a truculent demand upon his government by a foreign power for the abolition of protective duties, would be counted a recreant citizen and poor patriot; and even the circumstance that he regarded the collection of such duties as moral robbery, would not save him from censure. Such are the views and feelings by which human conduct is ordinarily controlled, and America is no stranger to them. The people and statesmen of the South regarded and accepted the abolitionist agitation as a challenge to take measures for the defence of rights expressly guaranteed to them by the Constitution and the laws. Meanwhile, doctrines which, if not wholly novel, had languished for want of nourishment, but which were peculiarly adapted to the new situation, began to be widely disseminated, ecclesiastics as well as laymen engaging in their propagation. Slavery, instead of being excused as a temporary evil, came to be proclaimed as a permanent good. The true foundation of society was the system of slavery;

free laborers were but false props, or, as Hammond eventually phrased it, "mud sills." Such were the arguments with which expediency, often the unconscious inventor of strange doctrines, deluded itself.

It cannot be denied that the slave interest had from the beginning exhibited a certain concern for its security. Nor does this seem strange, when we reflect upon the persistent localization of that interest, upon the existence of anti-slavery sentiment even among Southern leaders, and upon the fact that the States in entering into a national union surrendered in many respects the right of free self-determination which each State had previously possessed uncontested. The States specially interested in the system wished to retain control of it, and, even if its abolition should eventually come, desired to abolish it in their own time and in their own way. While, therefore, they agreed to the suppression of the trade at a fixed date, they asked for guarantees for the preservation of what they already possessed. Such guarantees we find in the provision of the Constitution for the equal representation of the States in the Senate, in the inclusion of slaves in the basis of apportionment of members of

the House of Representatives, and in the clause for the recovery of fugitives from service or labor.

It was evident, however, that the effectiveness of these constitutional provisions for the protection of local institutions must depend more or less upon the existence of a uniform public sentiment and of an equilibrium of power in the public councils. Even the rule of equal representation in the Senate might prove to afford an uncertain and feeble assurance, in the presence of a majority from free States strongly anti-slavery in sentiment. It was this feeling that gave rise to the principle of the balance of power, which found expression in the Missouri Compromise of 1820. This compromise left behind it little or no trace of bitterness. It was the result of a spirit of friendly accommodation on both sides. Nevertheless, it was a principle the introduction of which boded ill for the future. From the principle of democratic individualism, which preceded as well as succeeded the formation of the Constitution, it radically differed. In that principle there was no suggestion of dissension, of sectional antagonism, or of national disruption. States' rights, in this sense, conveyed no im-

plication of disunion. Not so with the principle of the balance of power; it imported into the relations between the States a political conception which, in Europe, had led to bloody and exhausting struggles. States' rights, in the sense of the balance of power, conveyed the implication of a sense of danger and foreshadowed a future of enmity, strife and dissension.

It is characteristic of the workings of the principle of the balance of power that, as it is rooted in a sense of insecurity, it seeks to safeguard itself by obtaining a preponderance, and this desire increases in proportion to the sense of danger. As the agitation against slavery grew, the activity of the defenders of slavery increased. The spirit of compromise gradually disappeared. Calhoun, the ardent advocate of the War of 1812, the eloquent proponent of internal improvements for the purpose of "connecting more closely the interests of various sections of this great country," the strenuous supporter of the Monroe Doctrine at the time of its promulgation, became the exponent of nullification and the instinctive antagonist of all measures that looked to the enhancement of the power of the national government. In order to moderate the growing estrangement, na-

tional men, Whigs and Democrats alike, North and South, manifested a constant willingness to make concessions. New efforts at compromise were made, and the spirit of compromise still remained in the air till the pronouncement of the Supreme Court in the Dred Scott case made an adjustment on the geographical basis of 1820 legislatively impracticable. [The declaration of the court that the Missouri Compromise was unconstitutional rendered unattainable the proposal to conciliate the interests of freedom and slavery by extending the line of that compromise to the Pacific Ocean, while the slaveholder now refused to surrender the right, which the court had declared to belong to him under the Constitution, to carry his slaves into any of the territories of the United States and hold them there in bondage.] The contest, upon the fair settlement of which any three intelligent and disinterested men, whose minds were not biased by partisanship, should have been able to agree in half an hour, began to be spoken of as the "irrepressible conflict." It proved indeed to be irrepressible, but only in the sense that controversy had driven men to extremes and passion had taken the place of reason.

In November 1860 Abraham Lincoln was elected President of the United States. His electoral votes came wholly from North of Mason and Dixon's line. A divided Democratic party had opened the way to his election. The Republican platform had denied the authority of Congress or of a Territorial legislature "to give legal existence to slavery in any territory of the United States." Immediately after the election, a convention was called in South Carolina, and in due time the secession of the State was determined upon, because the party by which Lincoln was elected had, as was declared, "announced that the South shall be excluded from the common territory." The example of South Carolina was soon followed by Alabama, Georgia, and other Southern States; but it was not till after Fort Sumter was fired upon, that Virginia and North Carolina decided to secede.

The administration of Buchanan, during the last four months of which the secession movement took place, pursued a conciliatory course, in the hope that peaceful measures for the preservation of the Union might be devised, and that, if compromise should fail, Congress might adopt laws for strengthening the hands of the

Executive. Among the laws of the United States, there were only two statutes by which the President was authorized to deal with insurrection or rebellion. By the act of February 28, 1795,[1] entitled "An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions," it was provided (sec. 1) that in case the United States should be "invaded" or threatened with "invasion," and "in case of insurrection in any State, against the government thereof," the President might, on application of the legislature, or of the executive, if the legislature could not be convened, call forth the militia of any other State for the purpose of meeting the invasion or suppressing such insurrection; and that, (sec. 2) in case the "laws" of the United States should be "opposed, or the execution thereof obstructed, in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings," or by the powers vested by the act in the United States marshals, it should be lawful for the President to call forth the militia of any of the States "to suppress such combinations, and to cause the laws to be duly exe-

[1] 1 Statutes at Large, 424.

cuted." In addition to this statute, there was the act of March 3, 1807,[1] entitled "An Act authorizing the employment of the land and naval forces of the United States, in cases of insurrection." By this act it was provided "that in all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual State or territory," where it was "lawful for the President . . . to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed," it should "be lawful for him to employ, for the same purposes, such part of the land or naval forces of the United States, as shall be judged necessary, having first observed all the prerequisites of the law in that respect." Besides these statutes, there were the laws relating to the collection of the customs.

In the annual message of President Buchanan of December 3, 1860, on the assembling of Congress, not only was the existing state of federal legislation discussed, but the entire political situation was reviewed. No State had then passed an ordinance of secession, but conventions had been called in four States — South Carolina, Georgia, Mississippi, and Florida—

[1] 2 Stats. at Large, 443.

and the contagion appeared to be spreading. At the outset Buchanan declared that the result of the presidential election did "not of itself afford just cause for dissolving the Union," the more especially as Lincoln's election had "been effected by a mere plurality and not a majority of the people." The combined popular vote of Bell, Breckinridge and Douglas in fact exceeded that of Lincoln by nearly a million.[1] In order to justify "revolutionary resistance" the federal government must, said Buchanan, be guilty of "a deliberate, palpable, and dangerous" exercise of powers not granted by the Constitution. That the federal government was a mere voluntary association of States to be dissolved at pleasure by any one of the contracting parties—a "rope of sand" to be dissolved by the first adverse wave of public opinion in any of the States, was, he affirmed, a contention "wholly inconsistent with the history as well as the character of the federal Constitution," and was met and refuted by Jackson in his message of January 16, 1833, on the nullifying ordinance of South Carolina. The government created

[1] Bell, 590,631; Breckenridge, 847,953; Douglas, 1,375,157—total, 2,813,741. Lincoln, 1,866,452. Difference, 947,289.

by the Constitution had, declared Buchanan, precisely the same right to exercise its power over the people of all the States within its appropriate sphere as the State governments had with respect to the subjects not delegated to the United States; in short secession was "neither more nor less than revolution." Meanwhile, what, he inquired, was "the responsibility and true position of the Executive?" He was "to take care that the laws be faithfully executed." This was, said Buchanan, at the moment rendered impracticable in South Carolina, so far as the laws for the administration of justice by the federal judiciary were concerned, all the federal officers having resigned, so that there was no longer a district judge, a district attorney, or a marshal in the State. By the acts of 1795 and 1807, the President was, he said, authorized to call forth the militia and employ the army and navy to aid a marshal who, with his *posse comitatus*, was unable to execute process, but this duty could not be performed where there was no judicial authority by which process could be issued. Congress alone had power to decide whether the laws could or could not be amended so as to carry out more

effectually the objects of the Constitution. The same insuperable obstacles did not, he affirmed, lie in the way of executing the laws for the collection of the customs. With regard to the property of the United States in South Carolina, he stated that he did not believe that any attempt would be made to expel the United States from it, but that, if such an attempt should be made, the officer in command had been instructed to act strictly on the defensive, and that "the responsibility for the consequences would rightfully rest upon the heads of the assailants."

Buchanan then proceeded to discuss the question of the right of Congress "to declare and make war against a State" for the purpose of "coercing" it into submission to the Union, and expressed the opinion that no such power had been delegated by the Constitution to Congress or to any other department of the government. Even supposing that such a war should result "in the conquest of a State," "how," he inquired, "are we to govern it afterwards? Shall we hold it as a province and govern it by despotic power? In the nature of things," he continued, "we could not, by physical force, control the will of the people

and compel them to elect senators and representatives to Congress, and to perform all the other duties depending upon their own volition and required from the free citizens of a free State as a constituent member of the Confederacy." He therefore proposed, as a solution of all difficulties, instead of a resort to force, the adoption of certain amendments to the Constitution.

This passage on State coercion has been criticised as being at variance with the principle of self-preservation and as offering a loophole to secession; but I venture to say that it has been much misinterpreted. In support of this view it would not suffice to say that the message, in all its parts, closely and often literally follows an opinion given to Buchanan by his Attorney General, Judge Jeremiah S. Black, on November 20, 1860,[1] for, although it is admitted that Judge Black was a staunch Union man, and although it appears that he gave the opinion on his own proposal, even preparing with his own hand the questions which he should be requested to answer, yet, being only human, he too might have fallen into error.

[1] 9 Opinions of the Attorneys General, 517; Works of James Buchanan, XI, 20.

Nor is it necessary to advert to the circumstance that the message met the approval of all the Unionist members of the cabinet, including General Cass, who seems to have desired that the disclaimer of State-coercive power under the Constitution be made more emphatic. I desire merely to point out, in the first place, that, following the unequivocal denial of the right of secession and the assertion of the right of the federal government to enforce its own laws and defend its own property, the passage forms a transition and an introduction to the recommendation of measures of compromise; and, in the second place, that, in spite of all precautions taken, by amendment and otherwise, to "preserve the results of the war," the difficulty of controlling by force the will of the people of a State so as to compel them to elect Senators and Representatives and perform various other obligations to the Union remains today unsolved by any constitutional provision. Nor was it in fact solved during the war or during the troubled days that followed except upon the avowed principle, which confessedly lay outside the Constitution and which was first conceived in the throes of the great conflict, of holding and administering States as conquered

provinces. In 1862 the Supreme Court declared in the Prize Cases[1] that Congress, though possessing the power to declare war, could not "declare war against a State, or against any number of States, by virtue of any clause in the Constitution."

That Buchanan perfectly understood and foresaw that, from the exercise of the power to execute the federal laws and to defend the federal property, war might result, there can be no doubt. In connection with the proposals of compromise made in his annual message of 1860 he naturally did not give prominence to this phase; but, in transmitting to Congress on January 8, 1861, his correspondence with the South Carolina commissioners, whose State had then passed the ordinance of secession, although he again expressed the opinion that he "had no right to make aggressive war upon any State" and that this power was by the Constitution "wisely withheld . . . even from Congress," he declared, in italics, that "*the right and the duty to use military force defensively against those who resist the federal officers in the execution of their legal functions, and against those who assail the property of*

[1] 2 Black, 635, 668.

the federal government, is clear and undeniable;" and significantly added: "At the beginning of these unhappy troubles I determined that no act of mine should increase the excitement in either section of the country. If the political conflict were to end in a civil war, it was my determined purpose not to commence it, nor even to furnish an excuse for it by any act of this government." In a letter to a committee of the citizens of Chester and Lancaster counties, Sept. 28, 1861, he referred to the struggle as "a war which had become inevitable by the assault of the Confederate States upon Fort Sumter." And again, in a letter to Judge Black, March 4, 1862, he wrote: "They [the South] chose to commence civil war, and Mr. Lincoln had no alternative but to defend the country against dismemberment."

The state of peace being still unbroken, Lincoln, as his inaugural address foreshadowed, continued the conciliatory efforts of his predecessor. The situation was suddenly and radically changed by the shot fired in Charleston harbor on April 12, 1861. The attack on Fort Sumter, so far as it was inspired by the belief, which had been distinctly avowed, that the shedding of blood would lead Virginia and

North Carolina to make common cause with their sisters of the South, was well calculated; but, in the passionate blindness of the hour, it failed to reckon with the national spirit of the American democracy, which, if it could not find the means of preserving the Union in the letter of the law, would grasp them wherever it might find them.

The President proceeded promptly to meet the situation. On the 15th of April, he issued a proclamation in which, after reciting that the laws of the United States were opposed and their execution obstructed, in South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law," he called forth the militia to the aggregate of 75,000 men, "in order to suppress said combinations, and to cause the laws to be duly executed." In this proclamation the President obviously invoked the act of 1795; but he did not rely solely upon the terms of the law. He appealed "to all loyal citizens to favor, facilitate, and aid" his "effort to maintain the honor, the integrity, and existence of our national union, and the per-

petuity of popular government." He stated that the first service to be performed by the forces called forth would be to repossess the forts, places and property which had been seized from the Union. In conclusion he summoned Congress to assemble on the 4th of the ensuing July, to consider and determine upon such measures as the public safety and interest might seem to demand.

Events moved rapidly. On the 19th of April, four days after calling forth the militia, the President proclaimed a blockade of the ports of the seceded States. In this proclamation he recited that the revenue laws could not be executed in those States, and referred to the necessity of protecting the lives and property of citizens of the United States engaged in maritime commerce; but the blockade was, in substance and in effect, a measure of public war, and its character as such was soon avowed by the Department of State, which advised the diplomatic corps that it was to be considered as a blockade under the law of nations. On April 27, Virginia and North Carolina having then declared their secession from the Union, the blockade was extended to the coasts of those States.

The legality of these proclamations was afterwards passed upon by the Supreme Court and was affirmed by a bare majority of five to four.[1] Mr. Justice Nelson, with whom concurred the venerable Chief-Justice Taney, and Justices Catron and Clifford, delivered a careful dissenting opinion, in which he expressed the conclusion that no civil war existed between the United States and the States in insurrection till it was recognized by the act of Congress of July 13, 1861; that the President did not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, and thus change the country and all its citizens from a state of peace to a state of war; that this power belonged exclusively to Congress; that consequently the President had no power to set on foot a blockade under the law of nations, and that all captures before the 13th of July for breach of blockade were illegal and void. The majority on the other hand held that, in order to create a state of public war, or at any rate of civil war, no declaration was necessary; that a civil contest became a war by its accidents—the number, power, and organization of the per-

[1] The Prize Cases, 2 Black, 635.

sons who originated and carried it on; that the President, although he had no power to initiate or declare a war, was authorized by the acts of 1795 and 1807 to call forth the militia and to use the military and naval forces of the United States to repel invasion or suppress insurrection; that he was bound to resist force by force, and that, whether the hostile party was a foreign invader "or States organized in rebellion," he was "bound to accept the challenge, without waiting for any special legislative authority." "This greatest of civil wars," declared the court, "was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panopoly of *war*. The President was bound to meet it in the shape in which it presented itself, without waiting for Congress to baptize it with a name."

But the President did not stop with organizing an army and instituting a blockade. On April 27, the day on which the blockade was extended to Virginia and North Carolina, he issued an order to Gen. Scott, authorizing him

personally, or through the officer in command at the point where resistance should occur, to suspend the writ of habeas corpus at any point on or in the vicinity of any military line between Philadelphia and Washington. The reason given for this order was the "public safety," and the existence of "an insurrection against the laws of the United States."[1] Under this order, various persons were seized. Among them was John Merryman, of Baltimore County, Maryland, who was "charged with holding a commission as lieutenant in a company avowing its purpose of armed hostility against the Government, with being in communication with the rebels, and with various acts of treason."[2] Merryman was imprisoned in Fort McHenry, in command of Gen. George Cadwalader. In a petition to Chief-Justice Taney, praying for a writ of habeas corpus, he stated that he was peaceably in his own house with his family, at two o'clock on the morning of the 25th of May, when an armed force compelled him to rise from his bed and took him into custody. Chief-Justice Taney granted the writ, but, as the military authorities refused to

[1] McPherson's Hist. of the Rebellion, 177.

[2] McPherson's Hist. of the Rebellion, 154.

produce their prisoner, the court could only confess its inability to hear the case and embody its conclusions in a written opinion. Chief-Justice Taney stated that a copy of the order under which the prisoner was arrested was demanded by his counsel and refused; that it was not alleged in the return to the writ that any specific act, constituting an offence against the laws of the United States, had been charged against the prisoner upon oath; that he appeared to have been arrested upon general charges of treason and rebellion, without proof and without any specification of the acts which, in the judgment of the military officer, constituted these crimes; and that the officer refused to obey the writ of habeas corpus, on the ground that he was authorized by the President to suspend it. Thus, said the Chief-Justice, great and fundamental laws, which Congress itself could not suspend, had been disregarded and suspended by a military order supported by force of arms. The Constitution of the United States provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Nothing is said as to the authority by which the suspension shall

be made; but the view had been generally held that the power was vested in Congress. The action of the President was, however, sustained by an opinion of his Attorney-General Mr. Bates,[1] and the opinion of the Chief Justice was disregarded.

Thus, in fifteen days after the firing upon Fort Sumter, the office of President of the United States became a virtual dictatorship. The powers which he exercised were truly imperial. Not only was he employing force for the suppression of insurrection, but he was conducting a great civil war, capturing the vessels and property of the citizens of foreign powers on the high seas, and was disposing, as the public necessities seemed to require, of the liberties of individuals not connected with the military forces. In his message to Congress, upon the assembling of that body in July, he affirmed that the measures which he had adopted, "whether strictly legal or not," were "ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them." The President's confidence was

[1] Opinion of Bates, Attorney-General, July 5, 1861, 10 Opinions of the Attorneys-General, 74.

not misplaced. His course was "approved and applauded," one Senator indeed, Howe of Wisconsin, going so far as to declare that he approved it in exact proportion to the extent to which it was a violation of the existing law.[1] Not only did Congress sustain the President, but it was not itself sparing in the assumption of power. The confiscation act of August 6, 1861,[2] was designed to render possible the seizure and condemnation of all property used or intended to be used in support of insurrection and the forfeiture of slaves bearing arms or employed in service or labor against the United States. The confiscation act of July 7, 1862,[3] went much farther and in order to punish "treason and rebellion," authorized, in excess of previously recognized constitutional limitations, the seizure and condemnation of the property of all persons who thereafter should hold office, military or civil, under the Confederacy or any of its States; who, owning property in any loyal State, should give aid and comfort to the rebellion; or who, being engaged in the rebellion or aiding and abetting it, should

[1] Dunning, Essays on the Civil War and Reconstruction, 18.

[2] 12 Stats. at Large, 319.

[3] 12 Stats. at Large, 590.

not, after public warning and proclamation by the President, cease to support it and return to his allegiance to the United States. Popular opposition to the President's proclamation of September 24, 1862, which was styled "a necessary measure" of war, declaring martial law, led Congress to pass the act of March 3, 1863, by which the President was expressly authorized to suspend the writ of habeas corpus. By his proclamation of September 15, 1863, he announced a general suspension of the writ.

Why was it that the people, who had been accustomed to regard their Constitution with almost superstitious veneration, suddenly became willing to consider its observance purely as a question of policy and in individual instances even to regard its violation as a cause for exultation? Why were they ready to dispense with its guarantees and to live outside of its provisions under what was practically a Roman dictatorship? Simply and solely because of the imperial and imperious demand—general, heartfelt and insistent—for the preservation of the Union. This sentiment has by no one been more unequivocally acknowledged than by Lincoln himself in his famous letter to Horace

Greeley.[1] In this letter Lincoln, while stating that he intended no modification of his "oft-expressed personal wish that all men everywhere could be free," declared: "I would save the Union . . . The sooner the national authority can be restored, the nearer the Union will be 'the Union as it was.' If there be those who would not save the Union unless they could at the same time save slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time destroy slavery, I do not agree with them. My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery." And if, in order to save the Union, imperial powers must be assumed, then the people would have imperialism.

The demand for the preservation of the Union was not confined to the adherents of any political party. It proceeded from national men of all parties. Although it became the fashion to claim, after the Union was restored, that it was saved by the Republican party, yet, as a learned colleague of mine has lately pointed out,[2] there was effected, after 1862, in which

[1] August 22, 1862.

[2] Dunning, The Second Birth of the Republican Party, 16 Am. Hist. Rev., 56.

year the results of the elections were most discouraging to the Republicans, a fusion of War Democrats and Republicans under the name of the Union party, the declared purpose of which was to maintain the integrity of the Union at all costs. This movement culminated in the national convention at Baltimore in 1864, representing the Union party and comprising, as the chairman declared, men of all shades of previous political affiliation—"primitive Republicans and primitive Abolitionists . . . primitive Democrats and primitive Whigs . . . primitive Americans." It was as nominees of this convention and as candidates of the Union party that Abraham Lincoln and Andrew Johnson ran and were elected.

We have seen that Lincoln expressed a wish for the restoration of "the Union as it was." This desire he continued to cherish. This was shown by his efforts to enable the loyal inhabitants of Louisiana and Arkansas to reorganize their State governments. He had had enough of strife and longed for the restoration of tranquillity and good feeling. By his proclamation of December 8, 1863, he offered to recognize State governments set up by loyal persons equal in number to one-tenth of the voting

population of 1860. The policy of restoration was continued by Johnson on the conditions (1) of the annulment or rescission of the ordinances of secession, (2) of the repudiation of the war debts, and (3) of the ratification of the XIIIth Amendment, which confirmed the abolition of slavery. The emancipation of the slaves had been proclaimed by Lincoln in the exercise of his war powers, as commander-in-chief of the army and navy. It was thought to be desirable that the act should have express constitutional sanction. It was therefore provided by the XIIIth Amendment that neither slavery nor involuntary servitude, except as a punishment for crime, should exist within the United States or in any place subject to their jurisdiction; and that Congress should have power to enforce this article by appropriate legislation. On December 18, 1865, the Amendment was officially proclaimed, twenty-seven States having ratified it, including eight that had seceded. All the seceding States, except Florida and Texas, had then reorganized their governments, and the President urged Congress to complete the work of restoration. But other views were coming to prevail in Congress.

The work of restoration had been carried out

on the principle that the States were indestructible; that, while they had assumed and for a time maintained an attitude of insurrection towards the Union, they had never legally been out of it; and that on the termination of hostilities they would, upon the acceptance of certain conditions, resume their accustomed place in the constitutional system. This principle had been accepted as axiomatic. It pervaded the earlier legislation of the war and inspired the course of both Lincoln and Johnson, although the latter indeed went so far as to propound a theory of suspended animation. But views far more radical were coming to prevail. In place of the principle of State indestructibility, Mr. Sumner announced the theory of "State suicide." Others preferred the phrase "forfeited rights." But, by whatever name it might be called, it meant that the States might be treated as conquered territory till Congress should see fit to restore to them their rights. This theory, though revolutionary in its nature, was suited to the exigencies of the time, when statesmen could scarcely tell whether their conduct was guided by lust of power or by zeal for human rights. No doubt both motives were combined in the d-

mand for "the preservation of the results of the war." This demand came to embrace the elective franchise for the freedmen. The Civil Rights Bill, although vetoed by Johnson, was passed over his veto, and was embodied in the XIVth Amendment to the Constitution, which was proposed to the States in 1866. The Southern States refused to ratify it. Moreover, for the purpose of controlling the liberated slaves, they passed vagrancy and apprenticeship laws, which were regarded and denounced at the North as measures designed to nullify the effects of emancipation and restore the freedmen virtually to a condition of servitude.[1]

Proceeding then, in the midst of strong public feeling, upon the conquered-province theory, Congress inaugurated the imperialistic policy of military "reconstruction." Under the act of March 2, and the supplemental acts of March 23 and July 19, 1867,[2] the Southern States were divided into five districts and placed under military authority; the blacks were enfranchised and tests applied by which the whites

[1] These laws are severely attacked by Blaine, Thirty Years of Congress, II, 93-103; they are ably defended by Herbert, Why the Solid South? or, Reconstruction and its Results, 31-36.

[2] 14 Stats. at Large, 428; 15 id., 2, 14.

were disfranchised; and, in place of the restored governments, there were set up in this way new governments, by which the XIVth Amendment was ratified. An attempt to obtain a decision by the Supreme Court on the constitutionality of the reconstruction laws was frustrated by the repeal by Congress of the statute under which the appeal was taken.[1] The XIVth Amendment was proclaimed in 1868. It declared that all persons, born or naturalized in the United States, and subject to the jurisdiction thereof, were citizens of the United States, and of the State wherein they resided; that no State should make or enforce any law which should "abridge the privileges or immunities of citizens of the United States"; and that no State should "deprive any person of life, liberty, or property, without due process of law, or deny to any person, within its jurisdiction, the equal protection of the laws." If the right to vote was denied or abridged, except for participation in rebellion or other crime, the basis of representation in such State

[1] Ex parte McCardle, 7 Wallace, 506. The repealing act was passed, was vetoed by the President, and was re-passed over his veto, after the case was argued on the merits and taken under advisement, but before the judges had met in conference upon the decision proper to be made.

was to be proportionately diminished. The validity of the public debt of the United States was affirmed, and the payment of any claim for the loss or emancipation of slaves was forbidden. By the XVth Amendment, which was proposed in 1869, and proclaimed in 1870, it was provided that the right of citizens of the United States to vote should not be "denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude."

These amendments, which Congress was empowered to enforce by appropriate legislation, were designed to afford to the freedmen full political and civil rights throughout the United States. It soon became evident, however, that the political supremacy of the negro could be preserved only by military force. The freedmen, necessarily without knowledge of or experience in the exercise of political power, often exhibited little inclination to exercise their new political rights, even when exhorted and encouraged by their political leaders so to do. For ten years the struggle went on, but the opposition to negro rule, sullen or active according to circumstances, continued, and in the end the attempt to maintain the political power

of the blacks was abandoned, its end being hastened by the striking corruption and profligacy of some of the so-called reconstruction governments.

Nor did the Supreme Court of the United States, when called upon to construe the constitutional amendments, go to the lengths which perhaps were originally expected. Judicial tribunals naturally lean towards conservatism; that the Supreme Court shares this inclination is shown by its decisions in the Slaughter House cases and in cases arising under the Civil Rights Act.

But the occasional conservatism of judicial utterances could hardly mislead us into supposing that the government of the United States could ever again revert to the position which it held prior to the civil war. The assumption, by President and by Congress, of imperial powers during that great conflict, the forcible assertion of national and even party supremacy by the central government after its close, and the embodiment of these claims of authority in acts of legislation and constitutional amendments, had produced changes which could not be undone and which there was no general desire to undo. While the people

grew weary of and brought to an end what they conceived to be excesses of power, they felt no disposition to relinquish the fundamental claims of authority through the exercise of which they had preserved the national unity. On the contrary, with the national development, new needs arose for the exercise of national authority; new directions for the exercise of national power were revealed; social life, as well as political, became more complex.

Especially was this the case with regard to commerce. In the development of commerce between the States and with foreign nations, conditions arose and continued to arise with which the State governments were powerless to deal. In consequence, there was passed the Interstate Commerce Act, which merely furnished the foundation for a series of measures which have brought commerce more and more under the control of the federal government. And the end is not yet. To separate and distinguish infrastate trade from interstate trade becomes more and more difficult, while the tendency to solve the difficulty by bringing the former within the sphere of the latter becomes more and more apparent. He would be a rash man, who should assume to prophesy the even-

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But the occasional conservatism of judicial utterances could hardly mislead us into supposing that the government of the United States could ever again revert to the position which it held prior to the civil war. The assumption, by President and by Congress, of imperial powers during that great conflict, the forcible assertion of national and even party supremacy by the central government after its close, and the embodiment of these claims of authority in acts of legislation and constitutional amendments, had produced changes which could not be undone and which there was no general desire to undo. While the people

grew weary of and brought to an end what they conceived to be excesses of power, they felt no disposition to relinquish the fundamental claims of authority through the exercise of which they had preserved the national unity. On the contrary, with the national development, new needs arose for the exercise of national authority; new directions for the exercise of national power were revealed; social life, as well as political, became more complex.

Especially was this the case with regard to commerce. In the development of commerce between the States and with foreign nations, conditions arose and continued to arise with which the State governments were powerless to deal. In consequence, there was passed the Interstate Commerce Act, which merely furnished the foundation for a series of measures which have brought commerce more and more under the control of the federal government. And the end is not yet. To separate and distinguish infrastate trade from interstate trade becomes more and more difficult, while the tendency to solve the difficulty by bringing the former within the sphere of the latter becomes more and more apparent. He would be a rash man, who should assume to prophesy the even-

tual limits by which the national control over commerce is to be stayed. Nor is the fact to be lost sight of that in the development of intercourse, good neighborhood and co-operation among nations the treaty-making power is steadily being applied to an increasing number of subjects, and that the treaty-making power is not generally subject to the limitations by which the power of legislation is circumscribed.

As an illustration of how the exercise of the power to regulate intercourse among the States may be capable of interesting development, we may refer to the case of the Chicago Strike in 1894. In June of that year the workmen employed in the shops of Pullman's Palace Car Company struck against a reduction of wages and, the company having refused to refer the dispute to arbitration, the President of the American Railway Union, representing a large number of organized railway workers, ordered a sympathetic boycott of Pullman cars. Widespread disorders ensued, and traffic was interfered with by violent means. Injunctions against the rioters were issued by the federal courts, and the leader of the American Railway Union was arrested. President Cleveland,

on the first of July, gave orders for the protection of the mails and of interstate commerce by regular troops; and a few days later, rioting at Chicago having become general and many cars having been burned and damaged, he issued a proclamation calling on the mobs to disperse, on pain of being dealt with as public enemies. Order was immediately re-established in Chicago, and uninterrupted traffic resumed on the railways at that point and other places. President Cleveland's action in sending troops to the scene of disturbances, without awaiting a requisition of the State authorities, was protested against by the governor of Illinois and was a subject of much heated discussion; but it was at the time approved with little opposition by both houses of Congress, as well as by the public, and it afterwards received the sanction of the Supreme Court.

The tendency, which has been so signally manifested since 1860, to exercise imperial powers in domestic affairs, has been no less strikingly exhibited in foreign affairs.

The Monroe Doctrine, if considered with reference to the responsibilities which it potentially involved, was always imperial in its proportions. One cannot fail, however, to note

the fact that, in its tone and its tendencies, it has undergone a marked transformation. This tendency towards its transformation may first be seen in the special message of President Polk to Congress of April 29, 1848, in relation to Yucatan. An Indian outbreak having occurred in that country, the authorities offered to transfer "the dominion and sovereignty" to the United States, and at the same time made a similar offer to Great Britain and Spain. President Polk recommended the occupation of the territory by the United States, and, in so doing, declared that "we could not consent to a transfer of this 'dominion and sovereignty' to either Spain, Great Britain, or any other power." This pronouncement went beyond the declaration of President Monroe, which asserted the right of American States, whose independence the United States had acknowledged, to dispose of themselves as they saw fit, and was directed against the interposition of European powers to control their destiny against their will. John Quincy Adams, by whom the declaration was formulated, expressed the idea in his diary thus:

"Considering the South Americans as independent nations, they themselves, and no other

nation, had the *right* to dispose of their condition. *We* have no right to dispose of them, either alone or in conjunction with other nations. Neither have any other nations the right of disposing of them without their consent."

The declaration of President Polk would forbid the acquisition of dominion by a European power, even by voluntary transfer or cession; but, while his declaration rested upon intelligible and reasonable grounds and was expressly confined to North America, it represented a step forward in political conceptions.

A stage far in advance was reached in the utterances of Mr. Olney, as Secretary of State, and of President Cleveland, in the case of the Venezuelan boundary. While affirming that the particular object of the United States in that case was to prevent an American power from being forcibly deprived by a European power of its independence—an object which undoubtedly comes within the spirit of President Monroe's declaration — Mr. Olney boldly declared: "To-day the United States is practically sovereign on this continent and its fiat is law upon the subjects to which it confines its interposition." Surely it must be admitted that no declaration more imperialistic was ever

made by an American statesman; nor is its imperialistic lustre dimmed by the explanation, which Mr. Olney proceeds to make, that this paramount position of the United States on the American continent is due not simply to its high character, or to the fact that wisdom and justice and equity are its invariable characteristics, but also to the circumstance that "its infinite resources combined with its isolated position render it master of the situation and practically invulnerable as against any or all other powers." Mr. Olney is a statesman of conservative tendencies, and an advocate of the reign of law. He negotiated with Great Britain a remarkable treaty of arbitration, which the Senate, apparently on account of the comprehensiveness of its provisions, failed to approve. His attitude of restraint towards intervention in Cuba was well illustrated by the story that, when a certain naval officer remarked to him, "Mr. Secretary, I'd like to bring you a box of cigars from Havana," he promptly retorted, "I don't smoke." When the contemplation of our power excites in a statesman of such solid character and abstemious habits extraordinary exuberance of speech, must it not be confessed that there is a certain exuber-

ance in our blood? President Cleveland, in turn, in recommending to Congress the creation of a commission to investigate and report upon the boundary question, expressed the opinion that it would be the duty of the United States to resist by every means in its power, as a wilful aggression upon its rights and interests, the appropriation by Great Britain of any lands or the exercise by her of governmental jurisdiction over any territory which "we" should decide to belong to Venezuela. So far as this language seemed to imply that the United States possessed the right by itself authoritatively to fix the boundary between two other independent nations, it probably went beyond President Cleveland's intention; for, in another part of his message, he stated that any adjustment of the boundary into which Venezuela might enter of her own free will could not be objected to by the United States—a concession potentially involving a very substantial abatement from the claim that the United States was sovereign and its fiat law on the American continents.

A new and still later application of the Monroe Doctrine is that which was made by President Roosevelt in the case of Santo

Domingo.] February 15, 1905, he transmitted to the Senate a treaty under which the United States agreed to undertake the adjustment of all Dominican debts, domestic and foreign, and to that end to take charge of and administer the custom houses. [In the message accompanying the treaty, President Roosevelt stated that conditions in Santo Domingo had for many years been growing steadily worse, that there had been many disturbances and revolutions, and that debts had been contracted beyond the power of the republic to pay. Those who profited by the Monroe Doctrine must, he affirmed, accept certain responsibilities along with the rights which it conferred; and the justification for assuming the responsibility proposed in the present instance was to be found in the fact that it was incompatible with international equity for the United States to refuse to allow other powers to take the only means at their disposal of satisfying the claims of their citizens and yet to refuse itself to take any such steps.] Under the Monroe Doctrine the United States could not, said President Roosevelt, see any European power "seize and permanently occupy" the territory of an American republic, and yet such seizure might eventually offer the

only way in which such a power could collect any debts, unless the United States should interfere. In these circumstances the United States should, he maintained, take charge of the custom-houses. The treaty was not approved by the Senate; but a later treaty, signed February 8, 1907, carrying out the principal object on the basis of an actual adjustment with creditors meanwhile accomplished, was duly ratified, and put into effect, and under its provisions the Dominican customs are now administered.

A transformation similar to that which the Monroe Doctrine has undergone may be observed in the case of the interoceanic canal. Originally, the canal was conceived of as a highway open to all nations and neutralized by the action of all; and it was not imagined that the United States had the constitutional power either to construct such a way by its own means or to charter a company for that purpose. On June 21, 1849, Elijah Hise concluded a treaty with Nicaragua granting to the United States the " exclusive right and privilege " to build an interoceanic way through that country. By this treaty it was provided (Art. III) that, if the United States should not construct the

work, then either the President or Congress should issue a charter to someone for the purpose. In the debates in the Senate, in March 1853, on the Clayton-Bulwer treaty, Mr. Clayton, in adverting to the fact that the Hise treaty was never submitted to that body, declared that he had never yet met with any man of any party, who supposed that the government of the United States had the power to make improvements outside of the United States and their territories. He repeatedly recurred to the subject, and reiterated his belief that there was not a man in the Senate who would contend that the United States could either build the canal or grant an act of incorporation for the purpose. Not a Senator on either side of the chamber, in the course of the long running debates, rose to question Clayton's statement. No one went further than to contend that the canal, when built, should be exclusively protected by the United States without entering into an agreement with any other power; and there were few who went so far as this. After the civil war the tone of governmental and public utterances changed. The demand for a canal under exclusive American control became general. In time an act of incorporation was granted by

Congress to a construction company. Eventually, definite steps were taken by the government of the United States to build the canal either by its own means or through a chartered company. Soon afterwards a strip of territory was acquired by treaty from the new Republic of Panama, against whose recognition the government of Colombia, the prior sovereign, had protested. With reference to this transaction, Colonel Roosevelt is reported lately to have said that President Roosevelt "took" the territory,[1] a phrase which, even if it does not imply the exercise of a power which Mr. Olney would call "sovereign," sounds somewhat imperialistic. The declaration has at any rate had the effect of reviving past discussions. In President Roosevelt's annual message of December 7, 1903, it was explained that the detachment of the territory from Colombia was not unconnected with his vigorous maintenance of peace and good order along the transit route

[1] Colonel Roosevelt, March 23, 1911, in an address at the University of California, as quoted in the press, said: "I am interested in the Panama Canal because I started it. If I had followed traditional, conservative methods I would have submitted a dignified state paper of probably two hundred pages to Congress, and the debate on it would have been going on yet; but I took the Canal Zone, and let Congress debate, and while the debate goes on, the canal does also."

under Article XXXV of the treaty with New Granada of 1846; and we were further assured by his special message of January 4, 1904, and had rested in the assurance, that the same result might be ascribed to his exceptional but justifiable recognition and protection of the independence of the Republic of Panama, whereby Article XXXV, which an experienced diplomatist of legal antecedents described with technical accuracy as a "covenant running with the land," proved itself to be an agile as well as faithful attendant. Probably Colonel Roosevelt, in using the word "took," intended merely to emphasize the fact that as President he assumed the responsibility of acting in the matter without first consulting Congress.[1] But, the significant fact is that, the territory having been acquired, the United States promptly entered upon the building of the canal by its own means, and is now taking effectual measures to fortify it.

[1] In *The Outlook* of October 6, 1911, Colonel Roosevelt recurs to the message of 1903 and 1904, and defends his action as President substantially in this sense.

LECTURE IV

Expansion

In 1898 there was witnessed in the United States a spectacle not uncommon in times of exceptional activity, when the public mind is stirred by war or other disturbing incidents. At such times it usually happens that propensities and tendencies that have long been at work are revealed to the popular comprehension with exceptional clearness. To many to whom the light has just come it seems as if a new era had been entered upon. Thus it was that in 1898 our begoggled seers began to run about and proclaim the discovery that the United States had become a "World Power." The people of the United States had indeed founded upon the wreck of the old colonial system a great republic; they had established a constitution which marked an epoch in governmental development; they had laid the foundations of the system of neutrality; they had materially contributed to the establishment of the freedom of the seas, had announced the doctrine of ex-

patriation and had proclaimed the Monroe Doctrine. They had penetrated with their trade the most distant parts of the globe and had been the chief instrument in opening one of the great empires of the Far East to the commerce and residence of foreigners. Nevertheless, we were assured not only that we had become a "World Power" but that we had become so by reason of a rapid victory over a European power, weak in military and naval resources, as the result of which we had acquired some distant islands. We were advised that we had entered upon a policy of "expansion"; and this assurance was given as if expansion were an entirely new thing in our history, and involved questions which we had never before been obliged to consider.

It is true that the expansion of 1898 involved, so far as concerns the Philippine Islands, the taking of a step geographically in advance of any that had been taken before; but so far as concerns the acquisition of new territory we were merely following a habit which had characterized our entire national existence.

We have indeed seldom confessed that we desired new territory; our general attitude has rather been that of the Washington correspon-

dent of a leading New York newspaper who recently declared, "We do not want more territory any more than we want fish bones in our coffee." But in spite of our distaste for this uncanny admixture of foreign and domestic products, the fish bones have continued to appear in our cups and we have continued to gulp them down without any specially unseemly grimaces.

To the founders of the American Republic, the question of territorial expansion did not present itself as a matter of theoretical speculation or even of choice. There was not a single European power having possessions in America that did not lay claim to more territory than it effectively occupied, nor was there a single one whose claims were not contested by some other power. With the contests for territory there were interwoven the struggles for the establishment of colonial monopolies in commerce and in navigation. The Spaniards and the Portuguese, the English and the French, the Swedes and the Dutch, contended with one another in Europe as well as in America for empire on the American continents. Their colonists knew no rules of life but that of conflict, and they regarded the extension of their boun-

daries as a measure of self-defense rather than of aggression.

In the plan of a treaty which the Committee of Secret Correspondence of the Continental Congress prepared in the early days of the American revolution for submission to France, it was expressly declared that the most Christian king should never invade nor attempt to possess himself of any of the countries on the continent of North America, either to the north or to the south of the United States, nor of any islands lying near that continent, except such as he might take from Great Britain in the West Indies; but that, with this exception, the sole and perpetual possession of the countries and islands belonging to the British Crown should be reserved to the United States. In the Treaty of Alliance which was concluded with France on February 6, 1778, this principle was carefully preserved. While the United States guaranteed to France the latter's existing possessions in America as well as any which she might acquire by the future treaty of peace, it was expressly stipulated that the United States, in the event of seizing the remaining British possessions in North America or the Bermuda Islands, should be permitted to bring

them into the Confederacy or to hold them as "dependencies." The King of France renounced them forever, reserving only the right to capture and hold any British Islands in or near the Gulf of Mexico.

It was altogether in harmony with these stipulations that the Articles of Confederation (Article VI) provided: "Canada acceding to this Confederation, and joining in the measures of the United States, shall be admitted into and entitled to all the advantages of this Union." No other colony was to be so admitted without the consent of nine States; and unless they consented, the colony, if seized, was to remain in a "dependent" position. When the Revolution came to an end, Canada and the British islands remained in British control. But the boundaries accorded to the United States by the Treaty of Peace were far more generous than the diplomatists of Europe had expected or than British statesmen had been accustomed to contemplate. Their northern extension may be seen on the map of the United States today by following the long winding line from Passamaquoddy Bay to the Lake of the Woods. On the west, the Mississippi River formed the frontier as far south as the thirty-

first parallel of north latitude. From that point to the Atlantic Ocean the territory of the United States bordered upon the Spanish possessions, which then embraced both East Florida and West Florida.

With the independence of the United States a new force entered into the territorial conflicts in America, but it did not alter their essential character. It was in order to obtain relief from burdensome conditions that the United States acquired Louisiana. Questions of disputed boundary and commercial restriction vexed and hampered the new member of the family of nations. Of all the commercial restrictions, that which promised to be least endurable was the claim of Spain as the proprietor of the banks to the exclusive navigation of the Mississippi River. The claim of exclusion which Spain asserted was not novel; the principle had come to be generally accepted in Europe. But it was conceived to be inconsistent with the doctrines of natural right which found their expression in the revolution in America and the revolution in France, and the United States were unwilling to submit to it. To the inhabitants of the west the Mississippi River was, as Madison once declared, "the

Hudson, Delaware, Potomac and all the navigable rivers of the Atlantic States formed into one stream."

During the dark hours of the American revolution the Continental Congress seemed at one time to be ready to yield to Spain in return for her alliance her exclusive claims, but happily this was not done. In the Treaty of Peace the United States, acting on the supposition that the Mississippi was navigable in British territory, agreed that its navigation should forever remain free and open to British subjects; but, south of the thirty-first parallel of north latitude, this freedom of navigation it was not within the power of the United States to assure. Spain continued to maintain her exclusive claims. The opposition to them in the United States grew stronger and louder till at length Spain on October 27, 1795, encompassed by many perils in her foreign relations, conceded to the United States the free navigation of the river, together with the privilege of depositing merchandise at New Orleans and then exporting it without payment of duty. The inestimable benefit of this arrangement was daily growing more manifest when, early in 1801, rumors began to prevail that Spain had

ceded both Louisiana and the Floridas to France. As a neighbor Spain, on account of the internal weakness of her government and the consequent unaggressiveness of her foreign policy, was not feared, but apprehension had from the first been exhibited by the United States as to the possibility of being hemmed in by colonies of England and France. If the rumor of cession should prove to be true, the arrangement with Spain for the free navigation of the Mississippi and the right of entrepôt was threatened with extinction. The feeling which these apprehensions excited was vividly expressed by Jefferson in a letter which he wrote as President to Robert R. Livingston, then minister of the United States at Paris,[1] in which he declared that the cession of Louisiana and the Floridas by Spain to France would completely reverse all the political relations of the United States and form a new epoch in their political course. There was, he affirmed, on the globe one single spot the possessor of which was "our natural and habitual enemy," and that was "New Orleans," through which the produce of three-eights of the territory of the United States must pass to market, a territory

[1] April 18, 1802.

the fertility of which would ere long yield more than half of their entire produce and contain more than half of their inhabitants. The pacific dispositions of Spain and her feeble state would, he said, induce her to increase the facilities of the United States, but it could not be so in the hands of France with her impetuosity, energy and restlessness; and Jefferson, who, although peaceful himself, well understood the character and temper of his countrymen, declared that the American people though quiet, peace loving, and pursuing wealth, were high minded, despising wealth in competition with insult or injury, and as enterprising and energetic as any nation on earth.

The treaty by which Spain ceded Louisiana to France was signed at San Idlefonso on October 1, 1800, but it was not published; in fact, even its existence was denied. It did not embrace the Floridas but included the whole of the vast domain then known as Louisiana, a domain out of which have since been carved the States of Louisiana, Arkansas, Missouri, Iowa, Minnesota, Kansas, Nebraska, South Dakota, North Dakota, and Montana, parts of the States of Colorado, Wyoming, and Oklahoma, and what remains of the Indian Territory. The ad-

ministration at Washington, though in the dark as to what had actually taken place, felt the necessity of action; it desired, if possible, to prevent the transfer of the territory, or, if this could not be accomplished, to obtain from France the Floridas if they were included in the cession,—or at least West Florida,—so as to give to the United States a continuous stretch of territory from the Lake of the Woods to the Gulf of Mexico on the eastern bank of the Mississippi.

Early in 1802 a report reached Washington that the Spanish intendant at New Orleans had suspended the right of deposit. It was soon learned that the suspension was not authorized by the Spanish government, but the act of the intendant gave rise to energetic discussions in Congress. A resolution was adopted by the House declaring that the stipulated rights of the United States in the Mississippi would be inviolably maintained, while a resolution was offered in the Senate to authorize the President to take forcible possession of such places as might be necessary to secure their full enjoyment. The state of public feeling was such that every branch of the government felt obliged to take measures not only

to preserve existing rights, but also, if possible, to enlarge and safeguard them. With this end in view, James Monroe was joined with Livingston in an extraordinary commission to treat with France, and with Charles Pinckney in a like commission to treat, if necessary, with Spain. The specific objects of the mission, as defined in the instructions given by Madison, as Secretary of State, on March 2, 1803, were the cession to the United States of the island of New Orleans and the Floridas.

Meanwhile, Livingston had, if possible, redoubled his exertions. His favorite plan was to obtain from France the cession of the island of New Orleans and all that part of Louisiana lying northward of the Arkansas River; and he also urged the cession of West Florida, if France had obtained it from Spain. On Monday, April 11, he held with Talleyrand a memorable and startling interview. Livingston was expatiating upon the subject of New Orleans, when Talleyrand quietly inquired whether the United States desired the "whole of Louisiana." Livingston answered that their wishes extended only to New Orleans and the Floridas, though policy dictated that France should also cede the country above the river

Arkansas; but Talleyrand observed that, if they gave New Orleans, the rest would be of little value, and asked what the United States would "give for the whole." Livingston suggested the sum of 20,000,000 francs, provided the claims of American citizens were paid.

Talleyrand pronounced the offer too low, but disclaimed having spoken of the matter by authority. In reality Napoleon had, on the preceding day, announced to two of his ministers his final resolution. The expedition to Santo Domingo had failed miserably; colonial enterprises appeared to be no longer practicable; war with England was at hand; and it seemed wiser to sell colonies than go down with them in disaster. In this predicament Napoleon decided to sell to the United States not only New Orleans but the whole of Louisiana, and, only a few hours before the interview between Talleyrand and Livingston was held, had instructed Barbé Marbois, his Minister of Finance, to negotiate the sale.

Monroe arrived in Paris on April 12. On the next day Marbois informed Livingston that Napoleon had authorized him to say that, if the Americans would give 100,000,000 francs and pay their claims, they might "take the

whole country." Noting Livingston's surprise at the price, Marbois eventually suggested that the United States should pay to France the sum of 60,000,000 francs and assume the claims of its own citizens to the amount of 20,000,000 more. Livingston declared that it was in vain to ask a thing so greatly beyond his country's means, but promised to consult with Monroe. The American plenipotentiaries were thus confronted with a momentous question concerning which in its full extent their instructions did not authorize them to treat; but, properly interpreting the purposes of their government and the spirit of their countrymen, they promptly and boldly assumed the responsibility. They accepted Marbois's terms, excessive as they at first seemed, and took the whole province. Speaking in a prophetic strain, Livingston, when he had affixed his name to the treaty of cession, exclaimed: "We have lived long, but this is the noblest work of our lives. . . . To-day the United States take their place among the powers of the first rank. . . . The instrument we have signed will cause no tears to flow. It will prepare centuries of happiness for innumerable generations of the human race." Time has verified Livingston's prevision. The

purchase of Louisiana has contributed more than any other territorial acquisition to make the United States what it is today.

Though the whole of Louisiana was ceded, its limits were undefined. The province was retroceded by Spain to France in 1800 "with the same extent that it now has in the hands of Spain, and that it had when France possessed it." By the treaty of April 30, 1803, the territory was ceded to the United States "in the same manner," but the boundaries had never been precisely determined. Livingston and Monroe assured their government that the cession extended to the river Perdido, and therefore embraced West Florida. This claim was not sanctioned by France, but Congress, acting upon Livingston and Monroe's assurance, authorized the President in his discretion to erect "the bay and river Mobile" and the adjacent territory into a customs district. Spain strongly protested, and the execution of the measure was held in suspense. In the summer of 1810, however, a revolution took place in West Florida. Baton Rouge was seized; the independence of the province was declared; and an application was made for its admission into the Union. The President repulsed this

application, but occupied the territory as far as the river Pearl, as part of the Louisiana purchase. The country lying between that stream and the Perdido was permitted still to remain in the possession of Spain.

On the 3d of January, 1811, President Madison sent to Congress a secret message in which he recommended the expediency of authorizing the Executive to take temporary possession of any part of the Floridas, in pursuance of arrangements with the Spanish authorities; or without such arrangements, in case those authorities should be subverted and there should be apprehension of the occupation of the territory by another foreign power. Acting on this message, Congress, in secret session, on the 11th of January, "taking into view the peculiar situation of Spain and her American provinces," and "the influence which the destiny of the territory adjoining the southern border of the United States may have upon their security, tranquillity and commerce," resolved that the United States could not "without serious inquietude see any part of said territory pass into the hands of any foreign power," and that "a due regard to their own safety" compelled them "to provide, under

certain contingencies, for the temporary occupation of the said territory," the territory so occupied to be held "subject to future negotiation."

As to West Florida, Congress had, as we have seen, already empowered the Executive to exercise acts of possession; but as East Florida unquestionably still belonged to Spain, it was necessary to confer upon the President special powers in regard to that province in order to insure the object expressed in the resolution. Congress therefore authorized the President to take possession of and occupy all or any part of East Florida, "in case an arrangement has been, or shall be, made with the local authority of the said territory, for delivering up the possession of the same, or any part thereof, to the United States; or in the event of an attempt to occupy the said territory, or any part thereof, by any foreign government." For the purpose of occupying and holding the territory, the President was authorized to employ the army and navy of the United States; and the sum of $100,000 was appropriated "for defraying such expenses as the President may deem necessary for obtaining possession as aforesaid, and the security of the said territory."

January 26, 1811, Monroe, as Secretary of State, instructed Gen. George Matthews and Col. John McKee, as commissioners for carrying the act of Congress into effect, to repair to East Florida with all possible expedition, keeping their mission secret; and if they should find Governor Folk or the local authority existing there inclined to surrender the province in an amicable manner, they were to accept the abdication in behalf of the United States, and if necessary agree to restore the country at a future period to the lawful sovereign. They were also authorized, if necessary, to assume the debts due by Spain to the inhabitants of the territory; to guarantee titles to land; to permit the Spanish civil functionaries to retain their offices; and to advance a reasonable sum for the transportation of the Spanish troops. If no such arrangement could be made they were instructed to keep on the alert, and on the first undoubted approach of a foreign power to take possession of the territory. In that event they were to exercise a sound discretion as to making promises, taking care to commit their government no further than was necessary. A similar course was enjoined in regard to that part of West Florida still held in the name of Spain.

It does not appear that McKee acted under this commission; but Matthews accepted it, repaired to the Florida frontier, and took up his residence at St. Marys. He found, however, that the governor and local authorities were loyal to Spain, and not inclined to deliver up the territory; nor was there any sign of an attempt on the part of any foreign power to seize it; and the general contentment of the inhabitants, arising from the agricultural prosperity of the country, was enhanced by the profits of the vastly increased trade which the United States non-importation act diverted to the neighboring province and of which Fernandina, on Amelia Island, was the chief entrepôt. Nevertheless, there existed along the border a certain element, largely composed of persons who had emigrated from the neighboring States, which, although incompetent to effect a revolution without external aid, was willing to undertake a revolt if properly supported. This support Matthews promised; and on March 14, 1812, more than a year after his mission began, a party of men, supplied with arms partly from the United States arsenal at Point Peter, assembled at Roses Bluff, across the river from St. Marys, and raised the standard

of revolt against the government of East Florida. On the 16th of March they attacked the town of Fernandina. Coincidently, several United States gunboats took a position opposite the town, and the Spanish commandant, having been informed that they intended to assist the insurgents, surrendered to the latter, who took possession of the place and raised the "patriot flag." The next day General Matthews crossed the river with a detachment of the regular army and took formal possession of the town in the name of the United States, subject to the President's approval. Within a few days the insurgents, accompanied by a body of United States regulars and some volunteers from Georgia, set out for St. Augustine. Their procedure was systematic. Marching a little in advance of the American forces, the insurgents would take possession of the country and raise the "patriot flag," and then, in the character of "the local authorities," surrender the territory to General Matthews, who would receive possession in the name of the United States. In this way he received possession of the country all the way to St. Augustine, to which place siege was laid in the latter part of March.

The measures adopted by General Matthews for obtaining possession of Amelia Island and other parts of East Florida were disavowed by the United States, and his powers were revoked. Governor Mitchell of Georgia was appointed to succeed him, with instructions to withdraw the American troops and restore to the Spanish authorities the country thus taken from them. Monroe, referring to the employment of American troops to dispossess the Spanish authorities by force, said: "I forbear to dwell on the details of this transaction, because it is too painful to recite them." At the same time Governor Mitchell was directed to obtain from the Spanish authorities "the most satisfactory assurance" with respect to the immunity of those inhabitants who had acted with General Matthews. This proved to be a troublesome subject of negotiation, and together with certain other causes operated to postpone the final evacuation of the province till May 1813. The transaction thus briefly narrated was attended with lamentable results to the inhabitants of East Florida.

During the War of 1812 West Florida was the scene of hostilities between the British and the American forces, and in 1817 and 1818 it

was the theatre of the famous Seminole War. Meanwhile, the government of the United States was endeavoring to obtain from Spain the relinquishment of her provinces. The negotiations, which were conducted on the part of the United States by John Quincy Adams, were brought to a close by the treaty of February 22, 1819, by which Spain ceded to the United States not only the Floridas, but also the Spanish titles north of the forty-second parallel of north latitude from the source of the Arkansas River to the Pacific Ocean. In return, the United States agreed to pay the claims of its citizens against Spain to an amount not exceeding $5,000,000 and to indemnify the Spanish inhabitants of the Floridas for injuries suffered at the hands of American forces, besides granting to Spanish commerce in the ceded territories, for the term of twelve years, exceptional privileges.

The claim of the United States to West Florida, as part of the Louisiana cession, must be admitted to have been extravagant; but there is precise proof that France at least considered that the boundary of Louisiana on the south was the Rio Bravo and that the province therefore embraced the territory called Texas. By

the treaty of February 22, 1819, however, the territory lying between the Rio Bravo or Rio Grande del Norte and the River Sabine, which had long been in dispute between France and Spain and after 1803 between Spain and the United States, was acknowledged to belong to Spain, and subsequently on the independence of Mexico it became a part of that country. Soon afterwards efforts began to be made to recover Texas either in whole or in part. Two such attempts were made during the presidency of John Quincy Adams in 1825 and 1827. The effort was renewed by President Jackson in 1829 and again in 1833. In August 1835 the American minister in Mexico was directed to persevere in the task, and also to offer half-a-million dollars for the Bay of San Francisco and certain adjacent territory as a resort for American vessels in the Pacific. On March 2, 1836, the people of Texas through a convention of delegates declared their independence. In the following year the authorities of Texas made to President Van Buren an overture of cession, which he declined. The independence of Texas was, however, acknowledged not only by the United States but also by France and Great Britain, and treaties were made with

Texas by all those powers. On April 12, 1844, a treaty of annexation was concluded at Washington. This treaty having failed in the Senate, Congress by a joint resolution approved March 1, 1845, took action looking to the admission of Texas into the Union as a State. The terms offered in the resolution of Congress were accepted by Texas; and, by a joint resolution of Congress, approved December 29, 1845, the admission was formally accomplished. Texas was, to use the phrase of the day, "reannexed."

In spite of the fact that more than nine years had elapsed since Texas had declared her independence and begun to maintain it, and that treaty relations had been established by the republic not only with the United States but also with the two principal powers of Europe, the Mexican government had advised the United States that the annexation would be regarded by Mexico as a cause of war. Before the annexation was completed the Mexican minister left Washington and diplomatic relations were suspended. President Polk subsequently sent John Slidell as minister to Mexico to restore diplomatic relations and negotiate a settlement of all differences, which

embraced not only questions growing out of the annexation of Texas, but also the unsatisfied claims of citizens of the United States on account of damages suffered in Mexico. Slidell, after two successive governments had refused to receive him, returned to the United States. The Mexican government had already begun to collect its forces at Matamoras, near the mouth of the Rio Grande, which had by an act of the Texan Congress been designated as the boundary between Texas and Mexico. By the terms of the annexation, all questions of boundary that might arise with other governments were left to be adjusted by the United States. The Mexican government claimed all the territory between the Rio Grande and the River Nueces, and the massing of her forces was apparently intended to enforce this claim. By the act of Congress of December 31, 1845, creating the customs district of Texas, the town of Corpus Christi on the south of the Nueces was designated as one of five ports of delivery, Galveston being the only port of entry. In January 1846, General Taylor, who had under his command only 2,000 troops, was ordered to proceed to the north bank of the Rio Grande. He established himself at a point opposite Matamoras and pro-

ceeded to fortify his position. On April 12, General Ampudia, commanding the Mexican forces at Matamoras, demanded Taylor's withdrawal and his retirement to the north of the Nueces. Twelve days later (April 24) General Arista, who had succeeded Ampudia, notified Taylor, who had disregarded Ampudia's demand, that hostilities were begun. On the same day two companies of American dragoons, consisting of 63 officers and men, were while reconnoitering killed or captured by Mexican troops who had crossed the river above Matamoras. The war was indeed begun. General Taylor's official report of the attack upon his forces was received in Washington late in the afternoon on Saturday the 9th of May. On May 11, President Polk in a message to Congress stated that American blood had been shed on American soil and that war existed by act of Mexico. It is an unquestionable fact, disclosed by Polk's diary, that, if the report of hostilities had not reached Washington on the 9th of May, a message, recommending a declaration of war against Mexico, might have been sent to Congress on the 12th or soon afterwards. At a meeting of the cabinet on the morning of the 9th, all the members but one

advised the President that such a message should be sent, and it was agreed that it should be prepared and submitted to the cabinet on the 12th, together with the documents which should accompany it. The judgment of the President and his cabinet as to the nature and gravity of the situation was remarkably confirmed by the event.

Congress with practical unanimity responded to the President's view that war existed by act of Mexico, and a law was promptly enacted so declaring. In reality, within the three days preceding Polk's message, there had been fought the battles of Palo Alto and Resaca de la Palma in which the Mexican forces though superior in numbers were driven across the Rio Grande. By the Treaty of Guadalupe Hidalgo of February 2, 1848, by which the war was ended, the United States acquired California and New Mexico. The territory designated as New Mexico embraced the political divisions now known as Nevada, Utah, and Arizona, and parts of Wyoming, Colorado and New Mexico. In consideration of these cessions the United States paid to Mexico $15,000,000 and assumed the payment of claims of American citizens against Mexico to an amount

not exceeding $3,250,000. The acquisitions thus made were enlarged by the convention of December 30, 1853, commonly called the Gadsden treaty, by which Mexico for the sum of $10,000,000 released the United States from liability on account of certain stipulations of the Treaty of Guadalupe Hidalgo and ceded the Mesilla valley. This cession, which is often called the Gadsden Purchase, was strongly desired by the United States not only for the purpose of establishing a safe frontier against the Indians but also for the purpose of obtaining a feasible route for a railway near the Gila River.

No acquisition of territory by the United States has been the subject of so much honest but partisan misconception as that of the annexation of Texas and the acquisition of California and New Mexico. All shades of sentiment have been represented in the contest,—fatalists, providentialists, optimists, and pessimists have contended with one another for victory. By one school of writers, whose views have had great currency, the annexation has been denounced as the result of a plot of the slave power to extend its dominions, in spite of the fact that John C. Calhoun, who looked

with dread upon the enhancement of national power which military activities were likely to bring about, was one of the few opponents in Congress of the Mexican War. In reality, no extension of American territory was ever more completely in conformity with the aspirations and habits of thought of the American people. But for the controversy concerning slavery, it may be believed that there would have been no appreciable opposition in the United States to the acquisition of Texas or of California and New Mexico, and that such local antagonism as might have existed to the disturbance of the balance of power in the Union would have been overwhelmed by the general demand for an extension of boundaries so natural, and, except for the slavery question, in every respect so expedient. Certainly no acquisition was ever made in which the spirit of providentialism, which has been so influential in the extension of national boundaries, has been more clearly exemplified. Polk himself records that he suspended the composition of his war message, which was prepared on Sunday, in order to attend church, and it is hardly probable that the fervor which characterizes its concluding sentences was diminished by his devotions. He

was no hypocrite. His character is emerging from the mists of controversy as that of a sturdy American, devoted to his country, who had opinions of his own and maintained them with the confidence of sincere conviction. He instinctively regarded himself as promoting, rather than as transgressing, the designs of the Almighty in helping to enlarge the boundaries of the United States, while to him and the world of his time the battle stories of the Old Testament were more real than the peaceful counsels of the New.

The annexation, or "reannexation," of Texas had been earnestly advocated and was afterwards widely extolled as a partial fulfilment of the "manifest destiny" of the United States to embrace at least the entire continent of North America; and because some of those who used the phrase supported, or at any rate did not oppose, the extension of slavery, the doctrine of "manifest destiny" was on the other hand denounced as a slaveholders' doctrine. We of the present generations who have lately heard a statesman, on the verge of occupying a position no less exalted and responsible than that of Speaker of the national House of Representatives, intimate, in a spirit of pure

benevolence, while the fate of a delicate negotiation for wider trade relations with the Dominion of Canada was hanging in the balance, that the absorption of that part of the British dominions would not seriously tax our capacity, but might even be considered an agreeable and stimulating digestive operation, can see things with a clearer vision.[1] Manifest Destiny is not indeed a slaveholders' doctrine, but is merely providentialism in practical operation. It has by no one been more beautifully or suggestively described than by John Jay, a man of devout mind, who was with some foundation thought to have neglected the interests of the slaveholding

[1] February 14, 1911, the Hon. Champ Clark, then a member and Speaker-elect of the House, in the course of a speech on the Canadian Reciprocity Bill, said: "I am in favor of the reciprocity treaty to promote our trade relations. . . . I am for it, because I hope to see the day when the American flag will float over every square foot of the British North American possessions clear to the North Pole. They are people of our blood. They speak our language. Their institutions are much like ours. They are trained in the difficult art of self-government." He further declared that he had no doubt that the measure would tend to bring Canada into the Union, and being asked whether he thought that this would tend to preserve peace with Great Britain, he replied: "Why, certainly it will. I do not have any doubt whatever that the day is not far distant when Great Britain will joyfully see all her North American possessions become a part of this Republic. That is the way things are tending now." (Congressional Record, vol. 46, part 3, pp. 2520-2521.)

population of the United States in his treaty with Great Britain. Jay, in his first number of the Federalist, tells with what pleasure he had observed "that independent America was not composed of detached and distant territories, but that one connected, fertile, wide-spreading country was the portion of our western sons of liberty; that Providence had in a particular manner blessed it with a variety of soils and productions, and watered it with innumerable streams, for the delight and accommodation of its inhabitants"; that it had "navigable waters" to bind it together, and "the most noble rivers in the world, running at convenient distances", to provide communication and transportation; and that Providence had "been pleased to give this one connected country" to what, in spite of the combination of English and Irish, Dutch and Swedes, Spanish and French, Pilgrims and Puritans, Roundheads and Cavaliers, Protestants, Catholics and Quakers, he could call "one united people"—a people, he declared, "descended from the same ancestors, speaking the same language, professing the same religion"! Is it surprising that he finally exclaimed, "This country and this people seem to have been made for

each other"? Is it more surprising that this same "united people" should regard another fertile, well watered, widespreading country as equally made for it, if such country should happen to fall in its way? All North America was indeed in a sense connected, fertile, widespreading and well watered. A great part of South America may be described as connected, fertile, widespreading and well watered. The same happy conditions might even be found in Europe, in Asia and in Africa. It may truly be confessed that the conception is applicable to all quarters of the habitable globe.

Six months after the annexation of Texas and a month after the beginning of the Mexican War, the long dispute as to the Oregon territory was brought to a close. This territory was bounded, according to the claim of the United States, by the forty-second parallel of north latitude on the south; by the line of 54° 40′ on the north, and by the Rocky Mountains on the east. It embraced, roughly speaking, an area of 600,000 square miles. The claim of the United States was founded upon the discovery by Captain Robert Gray of the American Ship *Columbia*, in 1792, of the River of the West, which he named, from his ship, the

Columbia River; the exploration of the main branch of that river by Lewis and Clark; the establishment of the fur-trading post of Astoria by John Jacob Astor in 1815, and its restoration to the United States under the Treaty of Ghent; and finally the acquisition in 1819 of all the territorial rights of Spain on the Pacific Ocean above the 42° of north latitude. By the Democratic National Platform of 1844, the title of the United States to the whole of Oregon was declared to be clear and unquestionable; and this declaration was repeated by President Polk in his inaugural address in quotation marks. It was popularly interpreted to mean "Fifty-four-forty or fight," and Polk believed, not without reason, that the people were willing to fight for it. But on June 15, 1846, the dispute was terminated by a nearly equal division of the territory along the forty-ninth parallel of north latitude, the boundary being deflected southerly from that line at the Pacific so as to leave to Great Britain the whole of Vancouver's Island. The acquisition of this territory has been described as the result of a policy of "accretion" not colonization. This view was afterwards expounded by no less a Whig statesman than Edward Everett, who, as Secretary

of State, defended the territorial acquisitions from Mexico and evidently looked to the eventual absorption of Cuba by the United States. Vast regions, said Everett, which "had languished for three centuries under the leaden sway of a stationary system," had come "under the influences of an active civilization." Freedom of speech and of the press, trial by jury, religious equality, and representative government had, he declared, "been carried into extensive regions where they were unknown before," while, by the acquisitions on the Pacific, the "great circuit of intelligence round the globe" was completed. It may indeed be affirmed that the eloquence with which the acquisitive diplomacy had been reprobated was equalled only by the eloquence with which its beneficent results were afterwards set forth. Men of all parties, when their minds were drawn away from the contemplation of slavery and from the controversies to which its continued existence gave rise, could unite and with genuine enthusiasm sing the praises of expansion in the spirit of the lines—

"So shall the nation's pioneer
"Go joyful on his way,

"To wed Penobscot's waters
"To San Francisco's Bay;
"To make the rugged places smooth,
"To sow the vales with grain,
"And bear, with Liberty and Law,
"The Bible in his train.
"The mighty West shall bless the East,
"And sea shall answer sea,
"And mountain unto mountain call—
"Praise God, for we are free!"

By the treaty signed at Washington on March 30, 1867, the Russian Emperor, in consideration of the sum of $7,200,000, conveyed to the United States all his "territory and dominion" in America. We have called the territory Alaska. This transaction has been the subject of many strange conjectures. It has suggested that it was designed to reimburse Russia for the expense of her "friendly naval demonstration" during the Civil War in the United States,—a suggestion which may be placed in the category of the fantastic. It has been stated on the supposed authority of Robert J. Walker that the Emperor Nicholas was ready to give Alaska to the United States during the Crimean War if the United States would, in spite of the treaty of 1846, re-assert its claim to the whole of Oregon. The terri-

tory was in reality of comparatively little value to Russia, who had for years leased an important part of the southern coast to the Hudson's Bay Company. To the United States its potential value was obviously greater, while its acquisition was gratifying to the spirit of continental dominion which has always been so strongly manifested by the people of the United States. From the point of view, however, of communication and defense, the territory was as completely detached as if it had had no direct physical connection with the continent. The idea or mental conception of physical continuity has caused this aspect of the subject to be overlooked. In reality, for purposes of communication and defense, the United States was obliged to rely wholly upon the sea; not only was the intervening territory British but it was not readily traversable. In this aspect the situation of Alaska did not differ from that of a distant island or group of islands, while the most westerly of the Aleutian Islands, which form part of the cession, lies farther to the west of San Francisco than San Francisco lies to the west of New York.

The acquisition of the Hawaiian Islands under the joint resolution of Congress of July

7, 1898, marked the logical consummation of the special relations that had long subsisted between the United States and that group. As early as 1853 the United States, while William L. Marcy was Secretary of State, sought to annex the islands. Subsequently, annexation was put aside for reciprocity, but at length, on January 30, 1875, a treaty was concluded by which the islands were virtually placed under an American protectorate. This treaty was renewed in 1887, with an additional article conceding to the United States the right to establish a naval station in the harbor of Pearl River. February 14, 1893, a treaty of annexation was signed at Washington, but on the change of administration was withdrawn from the Senate. Another treaty of annexation, signed June 16, 1897, was still pending before the Senate when the joint resolution was passed by which the acquisition of the islands was definitely accomplished.

This transaction was consummated in the midst of the War with Spain. The Spanish islands in the West Indies, comprising all that remained to Spain of her once vast possessions in America, fall within the scope of the providentialist principle of "manifest destiny;" but

the Congress of the United States, in directing forcible intervention in the conflict between Spain and the Cuban insurgents, laid upon the people of the United States a self-denying ordinance with reference to Cuba. The Spanish possessions in the Far East and particularly the Philippine Islands lay beyond the accustomed range of American political thought. It may be affirmed that when the war with Spain began there were comparatively few of the inhabitants of the United States who could tell where the Philippine Islands were situated, and that the number was not large to whom even the name suggested more than a dim and vague reminiscence of early lessons in geography. Something had been heard commercially of Manila hemp, but there were few outside the trade who knew where Manila was.

The destruction of the Spanish Fleet in Manila Bay on the morning of the 1st of May, 1898, created the supposition that Manila was a Spanish city and led to a general acquaintance with the fact that it was in the Philippine Islands. But it may be confidently asserted that up to that time the acquisition of the Philippines by the United States had not been suggested even as a possible contingency; nor,

although Dewey's victory attracted attention to the islands, was it followed by any general or definite expression of a desire for their annexation. An accident of war was destined to exert an important influence on the direction of public sentiment. Soon after the destruction of the Spanish fleet telegraphic communication with the islands was severed. For this reason the orders that were sent out from Washington on August 12, on the signing of the peace protocol of that date, for the suspension of hostilities were a week old when they reached the Philippines. Meanwhile, on August 13, Manila was captured by the American forces and on the following day a capitulation was signed. A peaceful occupation of the city under the provisions of the protocol would have excited little feeling. The report of its capture by force of arms with some casualities was received in the United States eight days after the signing of the protocol. The effect was visible and pronounced. It gave a decided impulse to annexation sentiment. The question began to be popularly discussed as one not of taking the islands but of abandoning them. And the tendency to retain them was powerfully re-enforced by the growth of a missionary spirit which discerned

in the course of events a providential opportunity to promote the welfare of the natives, an opportunity the neglect of which, because of preconceived notions of national interests, would constitute a selfish and censurable abdication of duty.

Combined with this was the commercial spirit, which with its usual eagerness began to speak of the wealth of the islands, latent as well as available, as if it were all immediately convertible into cash, while nothing was placed on the opposite side of the ledger. Nevertheless, President McKinley in his instructions to the American Peace Commission of September 16, 1898, went no further than to say that United States could not accept "less than" the Island of Luzon. During the following weeks, however, much consideration was given to the subject; President McKinley made a tour of the country, and on October 28 the American commissioners were instructed that the President could see "but one plain path of duty—the acceptance of the archipelago."

A proposal to this effect was made, and, after much negotiation, an ultimatum was presented by the American commissioners, embracing the cession of the entire archipelago to the United

States and the payment to Spain of the sum of $20,000,000. The American commissioners, declaring it to be "the policy of the United States to maintain in the Philippines an open door to the world's commerce," further offered to concede to Spanish ships and merchandise, for a term of years, admission to the ports of the islands on the same terms as American ships and merchandise. They also proposed a mutual relinquishment of claims that had arisen since the beginning of the insurrection in Cuba in 1895. On this basis there was signed at Paris on December 10, 1898, a treaty of peace, under which the United States became the proprietor of all the Spanish islands in the West Indies except Cuba, and of the Philippine Islands and Guam in the East Indies.

While the acquisition of the Philippines was wholly unpremeditated, can it after all be said to have disclosed symptoms or tendencies with which the entire previous conduct of the United States was at variance? What is to be said of the case of Samoa? American traders early carried their operations into the Far East, and the interests which they established there were larger than is generally supposed. The part played by the United States in the opening of

Japan is so well known that it would be superfluous here to narrate it. Still, it did not involve the exercise of political control; but this cannot be said of the course of the United States with reference to the Samoan Islands. Although the United States was represented by a commercial agent at Apia at least as early as 1853, the affairs of the islands attracted little attention till 1872, when the great chief of the bay of Pago-Pago, in the island of Tutuila, with a view to obtain the protection of the United States, concluded with Commander Meade, of the U. S. S. *Narragansett*, an agreement under which the government was to have the exclusive privilege of establishing in that harbor a naval station. This agreement, although it was communicated to the Senate, was not acted upon; but on January 16, 1878, a treaty was concluded at Washington, by which the privileges previously sought to be conveyed to the United States were confirmed, and by which it was provided that, if differences should arise between the Samoan government and any other government in amity with the United States, the latter would "employ its good offices for the purpose of adjusting those differences upon a satisfactory and solid foundation." It was under this

clause, when conditions had been disturbed in the islands, that the conference, which was held in Washington in June and July, 1887, between Mr. Bayard, as Secretary of State, and the British and German ministers, on Samoan affairs, was brought about. The conference, no agreement having been reached, was adjourned till the autumn. Germany intervened in the islands, and became involved in hostilities with a part of the native population. The American naval forces in the islands were increased; Congress appropriated half-a-million dollars for the protection of American interests; and the friendly relations between the United States and Germany had become seriously strained and seemed to be in danger of rupture when, on the invitation of Prince Bismarck, the conference was resumed at Berlin. It resulted in the treaty of June 14, 1889, by which the islands were placed under the joint protection and administration of the three powers. The cumbersome, complicated and inappropriate tripartite government thus established broke down of its own weight; and at length, by a treaty between the three powers, concluded December 2, 1899, Tutuila and the adjacent islands, east of longitude 171° west of Greenwich, passed

under the jurisdiction of the United States, where they still remain, while Upolu and Savaii and other islands west of that meridian were left to Germany. The significance of the Samoan incident lies, however, not in the mere division of territory, but in the disposition shown by the United States, long before the acquisition of the Philippines, to go to any length in asserting a claim to take part in the determination of the fate of a group of islands, thousands of miles away, in which American commercial interests were so slight as to be scarcely appreciable.

Besides the annexations already described, the United States has acquired or assumed jurisdiction over many islands in various parts of the world. In 1850, the cession was obtained from Great Britain of Horse-Shoe Reef, in Lake Erie, for the purposes of a lighthouse. In 1867, Brooks or Midway Islands, lying 1100 miles west of Honolulu, were formally occupied by the commander of the U. S. S. *Lackawanna*. In like manner the atoll called Wake Island, lying in latitude 19° 17′ 50″ north and longitude 166° 31′ east, was taken possession of in 1899 by the commander of the U. S. S. *Bennington*. But the greatest extension of jurisdiction over

detached islands or groups of islands has taken place by a process of unconscious occupation which was very active during two decades of the past century. The discovery of Peruvian guano brought to the exhausted energies of the worn-out lands of the Eastern States a power of resurrection. In order to encourage and reward the search for guano in other quarters, Congress, by the Act of August 18, 1856, commonly called the Guano Islands Act, provided that, whenever any citizen of the United States should discover a deposit of guano on any island, rock, or key, not within the lawful jurisdiction or occupied by the citizens of any other government, and should peaceably occupy it, the President might, on the performance by the discoverer of certain conditions, treat it as appertaining to the United States; but the government is not obliged to retain possession after the guano shall have been removed. Under this statute about seventy islands, lying in various parts of the Atlantic and the Pacific, are still considered as belonging to the United States.[1]

An attempt was made by the United States in

[1] A list of these islands, with indications of their latitude and longitude, is given in Moore's Digest of International Law, I, 567 *et seq.*

1856 to obtain from New Granada the cession of five islands in the bay of Panama, with a view to protect the transit across the Isthmus. This attempt was unsuccessful. By the convention with the Republic of Panama, November 18, 1903, the United States acquired in perpetuity the use, occupation, and control of a zone ten miles wide on the Isthmus of Panama, and certain adjacent islands, for the purposes of an interoceanic canal. Within these lands and the adjacent waters the United States is declared to possess " all the rights, power, and authority " which it would have if it were the sovereign of the territory within which the lands and waters lie. These concessions were obtained from the Republic of Panama, to which compensation was made for them.

The acquisitions actually accomplished do not comprise the entire sum of the activities of the United States in the direction of territorial expansion. As late as 1870 the annexation of Canada, to which the Articles of Confederation looked, was the subject of informal discussions between British and American diplomatists. In 1848 Spain summarily repulsed an offer of $100,000,000 for Cuba. More than twenty years later, during the Ten Years' War, an unsuc-

cessful attempt was made to induce Spain to relinquish the island either by ceding it to the United States or by granting it independence under the latter's guarantee. Not long before, the Spanish government refused to cede the islands of Culebra and Culebrita to the United States as a naval station; they eventually passed to the United States by the peace of 1898. In 1848 an offer of the sovereignty of Yucatan was favorably received by President Polk, but the occasion for its consideration soon passed away. In 1854-1855 the United States sought to obtain a coaling station in Samana Bay; in 1866 a cession or lease of the peninsula of Samana was sought as a naval station. In 1868 the President of the Dominican Republic requested the United States immediately to take the country under its protection and to occupy Samana Bay and other strategic points as a preliminary to annexation. President Johnson in his annual message of December 9, 1868, Mr. Seward being Secretary of State, advocated the acquisition of "the several adjacent continental and insular communities as speedily as it may be done peacefully, lawfully, and without any violation of national justice, faith, or honor," and declared that, while foreign pos-

session or control of them had "hindered the growth and impaired the influence of the United States," "chronic revolution and anarchy would be equally injurious." A joint resolution was introduced in the House of Representatives for the annexation of the Dominican Republic. An agent from Santo Domingo was then in Washington awaiting action. The project was warmly espoused by President Grant, and on November 29, 1869, two treaties were concluded, one for the annexation of the Dominican Republic and the other for the lease of Samana Bay. Both instruments were communicated to the Senate on January 10, 1870. They failed to receive that body's approval, special and temporary causes contributing to the result. In his last annual message to Congress, in 1876, President Grant recurred to the subject, reaffirming his belief in the wisdom of the policy that he had proposed. In the plan to obtain the cession of islands in the West Indies, the Danish possessions were not overlooked. A convention for the cession of St. Thomas and St. John for $7,500,000, leaving Santa Cruz to Denmark, was signed at Copenhagen on October 24, 1867. The Senate of the United States, perhaps not uninfluenced by an earthquake and

tidal wave in the islands, failed to approve the treaty. January 24, 1902, a convention was signed at Washington for the cession of St. Thomas, St. John, and Santa Cruz, with the adjacent islands and rocks, all for $5,000,000. It was approved by the Senate. It was also approved by the lower house of the Danish Rigsdag, but failed in the upper house by an even division. The Mole St. Nicolas, in Haiti, was leased by the United States during the Civil War as a naval station, but the Haitian government in 1891 declined to let the harbor again for a similar purpose.

In spite of the process of continuous expansion, which the survey of the history of the United States discloses, there can be no doubt that there exists among the American people a prevalent belief that they are characterized above all things by freedom from territorial ambitions and a peculiarly peace-loving disposition. And yet, what is there in the history or antecedents of the American people to justify the presupposition that they are not only unaggressive but that they shrink from conflict and are perversely and incorrigibly peaceful? Is it found in the fact that they have conquered and subdued a continent?

Is it derived from the fact that the territory which they now hold, and which has been acquired largely as the result of war, is five times as great as that of the imperial domain with which they began their national career? Is it inferred from the circumstance that, since they forcibily established their independence, by an armed conflict of nearly eight years, they have waged four foreign wars, three general and one limited, and the greatest civil war in history? Have we forgotten the clamor for intervention, which is only another name for war, between Spain and Cuba, in 1898? Have we ceased to recall the cry "Remember the Maine," the denunciations of the system of concentration, and the harsh criticisms and rough impugnments of the conduct of a peace-loving President, when, after stemming for a year the rising tide of popular feeling, he delayed for a few days the submission of the question of war to Congress, in order that Americans might have an opportunity to leave Cuba?

The impression which more or less prevails in every nation that it desires peace more than other nations do can be regarded only as another example of that tendency to self-delusion which is worldwide in its operation and is one

of the commonest manifestations of everyday life. Not long ago I had the pleasure of listening to an eminent Hungarian statesman, who made eloquent addresses in various parts of the United States in favor of peace, and who appeared to be specially confident of just two things, and these were the peaceful disposition of his own people and the peaceful disposition of the people of the United States. As I listened to these gratifying assurances, I could not help recalling how, scarcely two years before, I had witnessed at rather close range the impressive and unmistakable manifestation by the speaker's own people, by articles in the press, by speeches, by the liberal voting of military credits and the marshaling of warlike agencies, of a lively disposition to administer an effective and perhaps absorptive rebuke to the neighboring kingdom of Servia, which, apparently fearing that its own independence was menaced, vigorously protested against the unexpected annexation of Bosnia and Herzegovina by the Imperial-Royal Government of Austria-Hungary. Nor did the speaker fail to draw a comparison between Prussia, armed to the teeth and therefore presumably panting for war, and the United States, unarmed and there-

fore presumably panting for peace, in spite of the fact that since the close of the Napoleonic wars, when Prussia again became master of her own destinies, her wars have scarcely exceeded in number those of the United States, even excluding from the computation the latter's Indian wars. To say that, after making the same exclusion, the years spent by Prussia, during the same period, in war, stand to those similarly spent by the United States hardly in the proportion of one to two, would be unfair, since Prussia's preparedness has enabled her to make her wars short.

It is often loosely asserted and probably is generally believed, not only that the United States is the foremost advocate, but also that it has always been the invariable practical exponent, of the principle of international arbitration; and in proof of this assertion, the large number of cases to which the United States has been a party is cited. In reasoning thus, two facts are overlooked. One is that in every case there have been two parties, and that Great Britain, who is so often spoken of as a warlike power, has been a party to many of them, and has herself had as many arbitrations as the United States, if not more. The second is that the

United States has not always agreed to the arbitral settlement of its own disputes. Even apart from disputes which have, like those related to the Monroe Doctrine, involved questions of national policy, the United States has not always accepted arbitration as a mode of settlement. "Six times," declared George Bancroft, as agent of the United States, in the case of the San Juan Water Boundary, "the United States had received the offer of arbitration on their northwestern boundary, and six times had refused to refer a point where the importance was so great, and the right so clear." And it was only when Great Britain consented, in 1872, to a qualified or restricted submission of the point in dispute, that the United States agreed to refer it to the German Emperor. The British offers between 1854 and 1858 to arbitrate the differences as to the meaning of certain clauses of the Clayton-Bulwer treaty were firmly declined. The proposal of Great Britain for the submission of the Bering Sea dispute to arbitration was made long before it was accepted. We refused to arbitrate the case of the "Maine" in any of its aspects, both before and after the war. Even after the demand upon Great Britain in 1895

for the unrestricted submission to arbitration of the Venezuelan boundary question, the Onley-Pauncefote treaty of January 1897, which was intended to carry arbitration between the United States and Great Britain to what were conceived to be the widest practicable limits, provided for the submission of territorial questions to a tribunal which was not in a proper sense arbitral, but which was to be so organized that it could not render a decision, unless one or more of the members appointed by one party should decide in favor of the other. It was only to such a tribunal that the United States consented to submit the Alaskan boundary question. Fortunately, Lord Alverstone, Chief-Justice of England, rose to the full measure of his opportunity, and enabled the tribunal to render a decision. We declined the request of Colombia for the arbitration of the controversy as to the Republic of Panama and the Canal Zone. It is needless to extend the enumeration.

It is, in reality, a common error to confound what is called militarism, referring to the maintenance of large standing armies by conscription, with the existence of a militant spirit, and to assume that the latter is produced by

the former. Among intelligent and candid men, one can scarcely run the risk of being understood to advocate great armaments for their own sake, who affirms that the connection is at least greatly exaggerated. A sense of superiority, or of superior strength, military or otherwise, no doubt may induce a government more readily to assume an aggressive position, and may tend to develop a certain brusqueness or even arrogance of manner. We may also concede that it would be an advantage to the world, as well as a beneficent relief to particular countries, if there should be brought about such a limitation of armaments as would result in a substantial abatement of military preparations. But, admitting all this to be so, it nevertheless remains true that the nations of Europe, with large military establishments, are by no means so warlike or so intent upon war as is habitually asserted or assumed by those who denounce their military system. The subject has another side. It is quite possible that an occasional military parade, or a few weeks spent in the summer at a seaside resort for drill and social diversion, may create illusions with regard to war and encourage a military spirit; but such is not the life of the

conscript. The monotonous and self-denying routine of the barracks, the daily drills and marches, the performance of the severe and exacting duties of the camp and the field, and the discharge of all the functions of military life except that of actual battle, do not tend to create the illusion that war is a dress parade or a pastime. On the contrary, the conscript learns that, quite apart from the chances of death, war is a serious and onerous business. Nor are war and its chances and hardships impressed upon him alone. The dread realities are brought to the consciousness of every family in the land, so that the entire population is made to feel that, if conflict comes, every home must offer its sacrifice and make its contribution. The great standing armies of Europe today are not the hireling forces by which, in former times, absolute rulers sought to accomplish their ambitious purposes. They are the people themselves, drawn from and representing the masses, and are for the most part created and maintained in the belief that, while the system has a disciplinary and educational value, its object is essentially defensive.

It is important that the truth with regard to this subject should be candidly stated and cor-

rectly apprehended, not only in order that mistaken and injurious criticism of others may be avoided, but also in order that the human propensity towards self-assumption of superior virtue may not be falsely encouraged. Questions of war and of peace depend, and will continue to depend, not so much upon the size of military establishments as upon the cultivation of the spirit and habit of justice, of self-control, of reciprocal recognition of rights and of forbearance. If these things be not practiced; if impatience takes the place of deliberation; if insistent and one-sided demands are substituted for measures of accommodation; if troubled situations are permitted to furnish the occasion for exceptional exactions; if differences in race and in national traits and customs are made to serve as the basis of unfriendly criticism, railing accusations and violent suspicions—then all plans for the preservation of peace will prove to be as so much waste paper. Outside the state, just as within the state, peace will be permanently preserved only by carrying into our dealings one with another the sentiment of fraternity and the spirit of conciliation.

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